(24,770)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 491.

SEABOARD AIR LINE RAILWAY, PLAINTIFF IN ERROR,

vs.

BEAUREGARD MAGDALENE KOENNECKE, AS ADMINISTRATRIX OF THE ESTATE OF J. T. KOENNECKE, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

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1 THE STATE OF SOUTH CAROLINA:

In the Supreme Court, Fifth Circuit, Richland County, November Term, 1914.

Mrs. BEAUREGARD MAGDALENE KOENNECKE, as Administratrix of the Estate of J. T. Koennecke, Deceased, Plaintiff-Respondent,
vs.
SEABOARD AIR LINE RAILWAY, Defendant-Appellant.

Before Hon. W. A. Holman, Special Judge.

F. G. Tompkins, W. H. Cobb, C. S. Monteith, Counsel for Plaintiff-Respondent.
Lyles & Lyles, Counsel for Defendant-Appellant.

Case for Appeal.

This action was commenced on July 29th, 1913, by the service of a summons and the following

2 *Complaint.*

The plaintiff above named, as administratrix of the estate of J. T. Koennecke, deceased, complaining of the defendant above named, alleges:

1. That the said J. T. Koennecke departed this life intestate in the City of Columbia, County of Richland, and State of South Carolina, on or about the 13th day of June, 1913, leaving him surviving as his heirs and distributees his widow, Beauregard Magdalene Koennecke, and the following named children: Edith May Koennecke, George Allen Koennecke, Joseph Theodore Koennecke and Rosa Lee Watson, and that thereafter on the 10th day of July, 1913, letters of administration on his estate were duly granted to the said plaintiff by the Judge of Probate for the said County of Richland; that the plaintiff thereupon qualified and has since been and now is the duly qualified administratrix of the said estate, and brings this action for the benefit of herself and children.

2. On information and belief that the defendant, Seaboard Air Line Railway, is now, and was at the times hereinafter mentioned, a corporation duly chartered and organized under and by virtue of the laws of the States of Virginia, North Carolina and South Carolina, and as such owns and operates, and, at the times herein mentioned, owned and operated a line of railway, together with tracks, yards, shops, engines, trains and all appurtenances thereto, at Cayce, in the County of Lexington, in the State of South Carolina, and having in and running through the City of Columbia, County of Richland and State of South Carolina, tracks, engines and trains, and having an office and an agent in the said City of Columbia, County

of Richland and State of South Carolina, for the transaction of business as a common carrier of passengers and freight.

3. On information and belief that the said J. T. Koennecke, at the times herein mentioned, was in the employment of
3 the said Seaboard Air Line Railway as yard conductor or switchman in the yards and upon the tracks of the said defendant at Cayce, in the County of Lexington and State of South Carolina.

4. On information and belief that while engaged in said employment on or about the 13th day of June, 1913, in the said yard of the said defendant company at Cayce, in the County of Lexington and State of South Carolina, the said J. T. Koennecke was run over by a train of the said defendant company on a track in the said yard at Cayce, known as track number four, and by reason thereof the said J. T. Koennecke was [*horribly mangled, bruised and crushed, both of his legs being severed from his body by the said train of cars*], from which injuries he died a few hours thereafter.

5. On information and belief that the said J. T. Koennecke was engaged in the performance of his duty as switchman or yard conductor in the yards of the said defendant company; that there were no lights in the said yard adequate for the proper protection of the said J. T. Koennecke in the performance of his duties; that the tracks and the walkways between the tracks were in a dangerous and unsafe condition, having piles of clinkers and cinders and coupling pins in between the tracks, making the same dangerous and unsafe; that the train which ran over [*and mangled, crushed*] and killed the said J. T. Koennecke consisted of an engine and a great number of box cars to the amount of more than twelve; that the engine was backing with the tender of the engine in front, pulling the box cars behind; that no lookout was kept by the agents of the said defendant company, nor was proper signals or warnings given of the approach of said train of cars, nor was any employee placed on the rear of the engine to keep a lookout in the direction the train was moving
4 to avoid striking persons or obstacles on the track, as was and is required by the rules and regulations of the said defendant company.

6. On information and belief that the injuries which resulted in the death of the plaintiff's intestate was caused wrongfully by the careless, negligent, wanton and reckless conduct of the defendant, its agents and servants, in failing to furnish a safe place for the plaintiff's intestate to work; in failing to furnish adequate lights for his protection; in having the track and walkways between the tracks in a dangerous and unsafe condition as aforesaid; in failing to give the proper warning of the approaching train; in failing to keep a proper lookout and in failing to keep an employee on the rear of the engine as aforesaid, and by reason of said negligent, careless, wanton and reckless acts the plaintiff's intestate was [*crushed, mangled*] and killed in the performance of his duties as aforesaid.

7. That the said J. T. Koennecke left as his only heirs and distributees at law his wife, the plaintiff herein, and his four children as above named, who were dependent upon him for support, comfort

and maintenance in life, and by reason of his death, caused by the negligent, wanton, wilful and reckless acts of the defendant as aforesaid, they have suffered damages in the sum of seventy-five thousand ($75,000.00) dollars.

Wherefore, plaintiff demands judgment against the said defendant for the sum of seventy-five thousand ($75,000.00) dollars and for the costs of this action.

REMBERT & MONTEITH,
Plaintiff's Attorneys.

(Duly verified.)

Motion to Strike Out.

Within twenty days, the defendant duly served notice of a motion to strike out the words in paragraphs four, five and
5 six of the complaint, which are indicated by the brackets and italics in the complaint as printed above. This motion was taken up by agreement upon the call of the case and before the drawing of the jury, and the same was sustained, and these portions of the complaint were ordered stricken out. The motion also included other portions of the complaint, as to which it was refused, but as to these no exception is taken.

The defendant duly served and filed the following

Answer.

The defendant, reserving the right to make its motion to strike out certain portions of the complaint, notice of which is herewith served, makes the following answer to the complaint:

For a First Defense.

1. In answer to paragraph one, it admits that J. T. Koennecke departed this life in the City of Columbia, on the thirteenth day of June, 1913, but denies knowledge or information sufficient to form a belief as to the other allegations of said paragraph.

2. It admits the allegations of paragraph two.

3. In answer to paragraph three, it admits that J. T. Koennecke at the time of his death was in the employ of the defendant as a switchman in the Cayce yards, but denies each and every other allegation in said paragraph contained.

4. In answer to paragraph four, it admits that J. T. Koennecke, while in the employment of the defendant as switchman in its Cayce yards, was run over by a train of the defendant, and received injuries from which he died, but it denies each and every other allegation in said paragraph contained.

6 5. Upon information and belief, it denies each and every allegation contained in paragraph five.

6. Upon information and belief, it denies each and every allegation in paragraph six.

7. Upon information and belief, it denies each and every allegation contained in paragraph seven.

For a Second Defense.

Upon information and belief, defendant alleges that plaintiff's intestate, at the time he came to his death, was in the employ of the defendant in its Cayce yards as switchman, and well knew that cars and engines were constantly shifting and switching on the various tracks, and notwithstanding such knowledge, plaintiff's intestate stepped in and upon one of said tracks without looking or listening for the approach of an engine or cars upon said track, and notwithstanding that plaintiff's intestate could by the exercise of ordinary care have ascertained the approach of said engine and cars, he failed to do so and stepped in front of same, and plaintiff's intestate failed to keep off of said track out of the way of said train, and failed to step off of said track out of the way of said train, and in so doing and in failing to do, he was guilty of negligence, which combining and concurring with the negligence of the defendant, if it was negligent, operated as a proximate cause of his own injuries and death, without which they would not have occurred.

For a Third Defense.

Upon information and belief, defendant alleges that J. T. Koennecke, at the time he came to his death, was in the employment of the defendant as a switchman in its yards at Cayce, and had also been employed in said yards for some time before his death, as night yardmaster and as yard conductor, and by virtue of such employment, he well knew the dangers incident to the duties of his employment as switchman in said yards, and well knew, or by the exercise of reasonable diligence would have known, the danger and risk of being struck and run over by the engines and cars which were constantly shifting through said yards, and the said danger and risk which caused his death was an ordinary and obvious risk incident to his employment, of which he was well aware, and the danger and risk of which he assumed.

7

LYLES & LYLES,
Defendant's Attorneys.

(Duly verified.)

Trial.

Upon these pleadings the case came on to be heard before Special Judge W. A. Holman and a jury in the Court of Common Pleas for Richland County on May 20, 1914, where the proceedings were had as shown by the following:

Transcript.

Pleadings read.

The COURT: As I understand the pleadings in the case, they have admitted the death of this party, admit he was in the employ of the

railroad company. On information and belief deny the allegations alleged in the administration upon the estate; so the issues now involved bring it down to the point as to the allegation of negligence alleged in the complaint and denied by the answer. Then there are two independent affirmative defenses set up. It is not necessary to prove any allegation that has been admitted by the pleadings.

Mr. MONTEITH: We will try to confine the proof to the allegations.

8 Mr. LYLES: I admit letters of administration (offered in evidence).

Dr. M. M. RICE (white), sworn, says:

Mr. MONTEITH:

Q. You are a practicing physician in the City of Columbia?
A. Yes, sir.
Q. Were you called upon to attend J. T. Koennecke June, last year?
A. I saw him only after his death.
Q. Did you make an examination?
A. Yes, sir; I made the post mortem examination of him.
Q. State what injuries you found on Mr. Koennecke?

Mr. LYLES: We object; it is not an issue in this cause. Stricken out.

The COURT: Might want to prove the character of the wound in order to illustrate how he was struck by the car.

Mr. MONTEITH: That is the purpose; yes, sir.

A. Were a good many injuries and bruises all over his body, on his back and hips, crushed in left side, back, above the hips, in the region of the spine, and both of his legs were mashed off, and several other——

Mr. LYLES: We object to this line of testimony.

The COURT: I will tell the jury that the suffering of the deceased is not an issue in the case.

Mr. MONTEITH: We understand. You stated that he had bruises on the back and hip?
A. Yes, sir.
Q. From the way his legs were injured could you tell whether from the back or front?
A. No, sir; could not tell, they were mangled; I could not say positively about that.
Q. The blow on his back, was that severe or light blow?
A. Very severe injury; crushed injury.
Q. Crushed his back?
A. Yes.
Q. How large was it, do you recall?
A. About, a little larger than my hand; about 5 or 6 inches in circumference.

9 Q. Did it go deep into his body?
A. Yes, sir; the muscles and skin and all the tissues mashed in and bruised considerably.

No cross-examination.

D. A. SMITH (white), sworn, says:

Mr. COBB:

Q. Where do you live?
A. Out in Shandon.
Q. Where did you work?
A. For the Seaboard.
Q. How long had you worked for the Seaboard?
A. About five years.
Q. At what place are you working now?
A. Interchange yard, down by Whaley and Tobacco streets.
Q. June last year where were you working?
A. Part of the time at Cayce, and part of the time on this side.
Q. Now, you say you worked over at Cayce part of last year, about June?
A. Yes, sir.
Q. Do you remember when Mr. Koennecke was killed over there?
A. I was working at daylight when this happened.
Q. Were you working at Cayce at that time?
A. I was at Cayce at that time.
Q. You recall the time he was killed; did you go back to work the next day?
A. Yes, I worked every day during that month.
Q. Did you ever see the place where it was said he was killed?
A. I have seen the place where I seen some blood on the track, and they told me——
Q. That is on the western side of the road which crosses the Seaboard at Cayce?
A. Yes, sir.
Q. How far from the crossing out that way?

Mr. LYLES: We object to any testimony about any public crossing.
The COURT: They do not allege in the complaint that he was killed on a crossing; don't allege that.

10 (Mr. COBB:)

Q. Up at the place where you saw this blood on the track, what track was that on?
A. No. 4.
Q. The day before, and some time before he was killed, had you seen walkways between the tracks?
A. 3 and 4 and between other tracks around.
Q. Where you saw the blood the following morning?
A. Yes, sir.
Q. What would you say with reference to the condition of the

walkway between 3 and 4, and between the other tracks, as to their condition?

A. Not nigh so level, betwixt the tracks was pretty rough in places.

Q. How was it rough?

A. Little banks of clinkers little higher than other low places.

Q. Were banks of cinders and clinkers; any pins?

A. I don't think any pins and iron were there.

Q. Did they extend between those two tracks at the place where he was killed, any distance?

A. I don't know whether that was level or rough place.

Q. Back on this side, the place where you saw blood?

A. The place on this side, that was fair walking.

Q. The place he was killed was rough?

A. Pretty rough.

Q. What was the condition of the space between the rails on this track?

A. I don't know; pretty good space.

Q. Was it level?

A. Right along there, in places it was level, and in places little banks, little clinkers about a foot high.

Q. Between the rails?

A. No, it was not level betwixt, had not been filled in.

Q. Wasn't any pile of clinkers between the rails?

A. No, sir, not between the rails.

Q. Could walk along on that?

A. Yes, could step from one tie to the other.

Cross-examination by Mr. LYLES:

Q. You say that walkway, some portions of it were all
11 right, some portions of it little uneven?

A. Yes, sir, that was the idea.

Q. You do not know where Mr. Koennecke was standing at the time he was killed?

A. I do not.

Q. You will not undertake to say that the walkway at the point Mr. Koennecke was standing at the time he was killed was anything wrong with it?

A. I don't know where he was standing at.

Q. Certain portions were all right and other portions unlevel, or a little uneven?

A. Yes, sir.

Q. You don't know that fills up this way?

A. No, not like you would fill them up.

Q. The ground had not been scraped even, that is what you mean?

A. Yes, sir.

Q. Did you ever walk along there?

A. Number of times.

Q. You never stumbled and fell to the ground?

A. Not along there, I did not.

Q. Anything along there anywhere in the vicinity where you saw the blood, or anything in the vicinity where this thing happened, that would cause a man to stumble and fall?

Mr. COBB: Let him state the facts and describe the conditions; not express an opinion.

Mr. LYLES: You never stumbled or fell?
A. Not along there I never.

The COURT: That would be a question for the jury.

Mr. LYLES: Did you know Mr. Koennecke?
A. Yes, sir; I knew him.
Q. Do you know what his position was with the road at the time he was killed?
A. I do not know; I do not know whether he was a switchman or yard conductor.
Q. You know he was connected with the switching engine in some capacity?
A. Yes, sir.
Q. He had been working there some months?
A. Yes, sir.
12 Q. And his work had been in the Cayce yard?
A. Yes, sir.
Q. Those yards are of some considerable size?
A. Pretty good size yard.
Q. Twelve or fifteen switching tracks in there?
A. Near about that many.
Q. Great many trains run into that place and made up and taken out of there?
A. Yes, sir.
Q. They have several switching engines in operation there?
A. At that time between three and four.
Q. There was a constant switching and moving of engines and cars in that yard at that time?
A. Yes, sir.
Q. Mr. Koennecke had been working in this yard doing some sort of work connected with switching engine for several months?
A. Yes, sir.

Mr. COBB:

Q. Did you work with Mr. Koennecke?
A. No, sir.
Q. He worked at night and you worked in the daytime?
A. Yes, sir; he was on a different crew.

T. A. BARKER (white), sworn, says:

Mr. MONTEITH: Have you the rule book, Mr. Lyles?
Mr. LYLES: Here is the rule book I produce in accordance with the notice without waiving my right to object to any rules contained therein, and without making any admission in connection with them.

Mr. MONTEITH: We call for the time table.

Mr. LYLES: In connection with the notice to produce the time table, we deny that any such thing has any bearing, or any reference whatsoever to this case. I have produced, in accordance with the notice, Rule Book containing all the rules and regulations applicable.

Mr. TOMPKINS: We call for the time table containing
13 general instructions for the government of employees, in effect June 13, '13; he has refused to produce it on the ground that it has no relevancy to this case.

The COURT: I understood him to say he did not have such thing as that.

Mr. LYLES: I said I refuse to produce it.

Mr. MONTEITH:

Q. By whom are you employed?
A. Seaboard.
Q. In what capacity?
A. As yard conductor of the Seaboard at Cayce at the time Mr. Koennecke was injured.
Q. Was Mr. Koennecke working under you?
A. Yes, sir; he was.
Q. You were conductor and Mr. Koennecke——
A. Was switchman.
Q. What was the number of your engine?
A. 419.
Q. Now, do you know about what time Mr. Koennecke was injured?
A. Possibly about 8:30.
Q. Some time in the early part of the night?
A. Yes, sir.
Q. Was it the engine you and he were on that ran over him?
A. No, sir.
Q. What engine ran over him?
A. 423.
Q. Who was the engineer on that engine?
A. Benton.
Q. Who was the conductor?
A. Hunt.
Q. Who were the crew?
A. Hammel and Sellers.
Q. Your engine was switching over at Cayce?
A. Yes, sir.
Q. This engine 423, was that engine working on the Columbia side of the river?
A. Yes, sir.
Q. Had that engine been over to Cayce before that night?
A. No, sir, had not.
Q. Just before the injury what was Mr. Koennecke doing, if you know?

POOR COPY

A. Just before the injury he was on the track, on track
14 No. 8, I believe. We were working on local freight train 69, and picked up cab and put it on 8 track.

Q. Did you tell Mr. Koennecke, give him any instruction where to go from 8 track?

A. Yes, sir.

Q. What were those instructions?

A. We had some local cars on 9 track. After taking off cab, to also pick up cars on 9 and put on 8. Told Mr. Koennecke to let the cars run in back on No. 3 track with the engine.

Q. Going from 8 track to 3 track, Mr. Koennecke would have to cross over No. 4 track; 4 was between 8 and 3?

A. Yes, sir.

Q. You testified at the coroner's inquest in this case?

A. Yes, sir.

Q. The duties of a switchman made it necessary for him to be all over and about the yard, walking upon and across tracks—his duties required that of him?

A. The duties of a switchman are supposed to be what the yard foreman told him to do.

Q. In the performance of his duty it is necessary for him to pass over the tracks?

A. Yes.

Q. Did you see this train that ran over Mr. Koennecke?

A. I seen it when it came from Columbia.

Q. How was it running; was the engine going forward or backward?

A. He was backing, pulling his cars.

Q. It came from Columbia and went right down in track 4?

A. Yes, sir.

Q. Do you know whether the engine had any headlight burning on it?

A. No, sir.

Mr. LYLES: There is no such allegation in the complaint.

The COURT: I do not think you allege it.

Mr. MONTEITH: We say there was no proper signals or warning given of the approach of the train. We did not use the word "headlight"; but I submit a signal is either a light, by word of mouth, or anything that can be construed a signal.

15 The COURT: Ask the question. I will charge the jury you will have to make out your case, as alleged in the complaint, by the preponderance of the evidence.

Mr. LYLES: Not meaning to argue the matter, but our Supreme Court has indicated that it is not the proper practice to admit irrelevant testimony and then try to eliminate it from the case by the charge to the jury; once the testimony is out, the jury has not a technical mind like a lawyer has. I object. Irrelevant testimony should be excluded, and not allowed to go to the jury and charge out afterwards.

The COURT: Maybe their failure to have the light would not be giving warning. I cannot say what view the jury might take of it.

Might be the failure to have a light would be a failure to give warning. Lights, anything for the purpose of warning people of the presence of the engine, &c. I will admit that evidence, but there is no allegation in the complaint charging a failure to have a headlight as one of the acts of negligence in the case. The jury will not consider that except if you make it out as on the question of warning.

Mr. MONTEITH: We use the words, signals and warning.

The COURT: It may be the failure to have a light might come under that. Ask the question.

Mr. LYLES: I repeat my objection.

The COURT: Note the objection.

Mr. MONTIETH: Do you know whether the headlight was burning on the engine backing and pulling these cars in?

A. I do not recollect whether one was there or not.

Q. Do you know whether or not the bell was ringing?

A. No, sir, I do not.

Q. Do you know whether or not there was a switchman or any one on the rear of the engine?

A. No, sir; I do not recollect whether any one was on the rear or not.

Q. When did you first learn that Mr. Koennecke had been
16 injured?

A. I do not know just the time, must have been 9:40, something like that.

Q. With reference to the time you saw that train backing into that side track, with reference to that, how long after before you learned of the injury?

A. Must have been 10 minutes after.

Q. Who told you of it; or how was the alarm given?

A. First I knew of it the car inspectors with these big lights signed me down. They give me signal to stop; that is the first I knew of it.

Q. How far down in the yard—did you afterwards go down to where the man was, where Mr. Koennecke was; you went down there?

A. Yes, sir.

Q. As soon as you learned of it, how far down in the yard, approximately, was it from where you were standing when the train passed you, backing in?

A. Must have been ten car lengths.

Q. And a car is 36 to 40 feet long?

A. Yes.

Q. How many cars was that engine pulling in?

A. I do not know; they said they had 18 cars, I believe, but I don't know; I did not count the cars.

Q. Was it a pretty long string of cars, though?

A. Yes, sir.

Q. Was the engine backing at a high or low rate of speed?

A. Average rate of speed, four to six miles an hour.

Q. How far is it from Columbia to Cayce, do you know?

A. No, sir.

Q. Columbia is on this side of the river and Cayce is on the other side?
A. Yes, sir.
Q. The main line of the Seaboard is Columbia to Cayce?
A. Yes, sir.
Q. How long is the trestle?
A. I do not know, sir.
Q. Approximately, is it a mile in length or half a mile?
A. What trestle?
17 Q. Over the river here?
A. I do not know, sir; I have no idea.
Q. Cayce is a station of the Seaboard?
A. Yes, sir.
Q. Do you know what county that is in?
A. Lexington county.
Q. They have Cayce yards over there?
A. Yes, sir, known as the Cayce yards, across the Congaree River.
Q. In Columbia known as the Columbia yards?
A. Yes, sir.
Q. This engine that came over I believe you said that was the engine working on the Columbia side of the river?
A. Yes, sir.
Q. They would bring what cars they had for that side, and get what was there for them and bring them back?
A. Yes, sir.
Q. And they worked on this side. Your engine was the one upon which Mr. Koennecke was employed with you?
A. Yes, sir.
Q. You were switching at Cayce?
A. At Cayce; yes, sir.
Q. Do you recognize this time card of the Seaboard?
A. I don't know.
Q. (Showing same to witness:) That is like what you have seen?
A. Yes, sir.
Q. When is that in effect?
A. Sunday, April 27, '13.
Q. Went in effect April 27, '13?
A. Yes, sir.
Q. Do you recognize this one—that is another one—like what you have seen of the Seaboard time cards?
A. Yes, sir.
Q. What is the number of the first one I gave you?
A. No. 2.
Q. Now, this one?
A. No. 3.
Q. This No. 3 superseded No. 2?
A. Yes, sir.
Q. That was effective what date?
A. Effective June 22, '13.
18 Q. On June 13, '13, the one you have in your hand would be in effect?
A. Yes.

Q. Now, were not all the employees of the company supplied with that?

Mr. LYLES: I would like to see the paper.
The COURT: What paper?
Mr. LYLES: The paper the witness has.
Mr. MONTEITH: I will show the paper to counsel.
Mr. TOMPKINS: Just identify it for the purpose of offering it in evidence.
Mr. COBB: This is the paper he refused to produce.
Mr. TOMPKINS: If we offered the paper without having him say that the employees were supplied with same, that probably would not be competent.
The COURT: You use this in lieu of the one you demanded him to produce?
Mr. TOMPKINS: Yes, sir.
The COURT: Let counsel look at it.

Mr. MONTEITH: Are employees of the company supplied with a copy of the time card as they go in effect?

A. All trainmen are.
Q. All men that work the train service?
A. Yes, sir; employed in the train service are supplied with them.
Q. This time card contains general instruction for the government of employees?
A. All time cards do.
Q. This one is like what you have seen?
A. Yes, sir.

Mr. MONTEITH: We introduce this in evidence.
Mr. LYLES: We object. I would like to examine the witness with reference to that.
Mr. TOMPKINS: All right.
The COURT: Suppose you get through with him first.
Mr. TOMPKINS: He would have the right to bring out from this witness, if he can, facts which would show this paper was not given distribution among the employees.

Mr. LYLES: You say all the train men have a copy of the
19 time table; you mean men running trains or men running in the service—main line service?
A. Yes, sir.
Q. Switchmen, they don't get a copy?
A. No, sir, not switchman.
Q. This time card has no bearing on the switch engine in the yard service?
A. Yes, sir.
Q. Switchmen on the switch engines, they don't go by that time card; men on switch engines running in yards off the main line have nothing to do with the time card?
A. No, sir; not when off the main line.
Q. Nothing in the time card, or under general instruction, that applies to a switch engine when off the main line?

A. Not a thing.

Q. At the time that switch engine 423 ran over Mr. Koennecke, if it did, that was on track 4?

A. Yes, sir.

Q. It had left the main line of the Seaboard?

A. Yes, sir, it had.

Q. The Division changes at Cayce?

A. Yes, sir.

Q. The Cayce yard is under the jurisdiction of Superintendent Gore?

A. Yes, sir.

Q. That is the N. C. Division?

A. Yes, sir.

Q. The N. C. Division applied from Hamlet to Cayce?

A. Yes, sir.

Q. And the S. C. Division applies from Cayce yard south to Jacksonville?

A. Yes, sir.

Q. Now, the Cayce yards is in the North Carolina Division?

A. That is the way I understand it.

Q. This engine at the time it ran over Mr. Koennecke was under the jurisdiction of the North Carolina Division?

A. Yes, sir.

Mr. LYLES: Now, I object to the admission of that time card, or anything in it. The witness says it has no application to switchmen when off the main line service; on the further ground the time card shown not applicable to Cayce. Time card South Carolina Division and not of North Carolina Division.

Mr. TOMPKINS: Have you a copy of the Time Table No. 2, time table of Seaboard for North Carolina Division?

A. No, sir.

Q. State whether or not the general instructions which are found there are in the main the same on both division time tables?

A. They are on both.

Mr. TOMPKINS: That is as near as we can come to the time table which we demanded and which he refuses to give. We offer it in evidence as the best evidence of the time table that was in force.

The COURT: Let's see what your demand was.

Mr. TOMPKINS: For them to take notice that upon the trial of the case they would be asked to produce the time table in effect June 13, '13, and the general Rule Book, and that on the failure to produce said time table plaintiff would offer secondary evidence of same. It has the same title, Koennecke vs. Seaboard, and addressed to Lyles and Lyles. We think that is sufficient notice to him to produce such time table, as they claim was in effect at the place about which this action is concerned. They have not denied that they have it, and they have refused to produce it. We offer one of their time tables in South Carolina Division.

The COURT: The witness said the time table has no application to moving engine on the side track, switch track.

Mr. TOMPKINS: The general instructions are here, and they speak for themselves. They are the best evidence to what they apply, to whom and when applied. This was the time table of the Seaboard, in use by trainmen at that time, and he has not any closer time table, or any nearer to what they claim to be the time table than this. The witness says the rules are the same on both time tables. Now the time table is not in question; we are not suing about any missing of schedule——

21 The COURT: That is what I think.

Mr. TOMPKINS: The only time table in question is the instruction. It is a question for the jury to say whether or not these rules applied at the time this train was in motion; whether this train was in the yard making a yard movement or extended movement.

The COURT: Haven't they got a Rule Book on that?

Mr. TOMPKINS: Yes, sir; and we want that in also.

Mr. LYLES: We have produced the Rule Book, but refuse to produce the time table for the reason it has no application to the case. We have offered our Rule Book which contains the rule applicable to switch engines. He offers to prove this instruction in the time table by this witness, and the witness says it has no application to the——

Mr. TOMPKINS: It is a hard thing for the lawyers and the Judge to say.

The COURT: I will let you introduce the evidence. Note objection.

Mr. MONTEITH: We wish to call special attention to Rule U, under general instructions, which reads as follows:

Mr. LYLES: We object to the *instruction* of Rule U or any part of the time table; not properly proved, and irrelevant, and does not apply to the engine in question.

The COURT: State your ground, and let the stenographer take it down.

Mr. MONTEITH: I will read the rules to the jury:

"Cars will not be moved in front of engines, or engine moved backward, unless there is an employee on the front of the moving car, or on the rear of the engine, to keep a lookout, in the direction the movement is being made, to avoid striking persons or obstructions on track. Enginemen, as well as conductors, will be held responsible for violation of this rule."

Wasn't it customary for you all in the yard to be furnished with a copy of these time tables?

A. Yes, sir.

22 Q. You all had to receipt for a copy?

A. Yes, sir; all yard foremen.

Q. Yard conductors and everybody around there?

A. Yes, sir.

Q. Each one comes to you with a little receipt for you to sign and return?

A. Yes, sir.

Q. You are supposed to receipt that and return it to the Superintendent?

A. Yes, sir.

Q. That yard, what was the condition of the lights over at Cayce, lighting of the yard, any light except up at the office?

A. Yes, sir; we had lights; the sand house and roundhouse had lights, on the lead of the yard.

Q. In reference to the part where Mr. Koennecke was killed, any electric lights there?

A. None near there. Had electric light to sand house, and coal chute also.

Mr. MONTEITH: We had notice to produce served on our friend to bring a lantern, property of the plaintiff, that we were informed is in possession of the Seaboard. Counsel says he knows nothing of it.

Mr. TOMPKINS: Property of the Seaboard used by the defendant at the time of his death.

Mr. LYLES: There is no evidence to that effect. Counsel, because they cannot find something, cannot throw the burden on me. I never heard of the lantern.

The COURT: If he cannot produce it you may put up witnesses and introduce secondary evidence.

Mr. MONTEITH: Do you remember whether Mr. Koennecke had his lantern that night?

A. Yes, sir; he had a lantern.

Q. Have you seen that lantern since Mr. Koennecke's death?

A. I saw a piece of it.

Q. Where?

A. On the track near where we found him.

Q. Have you seen the lantern over at Cayce any time since you saw it there?

A. No, sir, I have not.

Q. The switchman was required to carry a lantern in his
23 hand?

A. Yes, sir; the switchman carries a lantern in his hand.

Q. And it was required to be lighted?

A. Yes, sir.

The COURT: You asked Mr. Lyles to produce something you prove was broken up?

Mr. TOMPKINS: It was injured, no doubt, but what was left of it was there.

The COURT: How do you suppose he gathered up the fragments of it?

Mr. TOMPKINS: My idea is this: if that lantern was in existence it would be the best evidence of what condition it was in. Of course this witness could tell it was there, but he could not testify the condition it was in. Can't we ask them to produce it; counsel says he has not got it; this witness does not know where it is. Can he testify the condition it was in?

The COURT: He said it was broken up, that he saw a piece of it.

Mr. TOMPKINS: Some evidence the lantern was broken up at the same time Mr. Koennecke was killed; this evidence shows he had it in his hand at the time.

The COURT: He says it was — duty to have one and that he had one.

Mr. MONTEITH: This lantern had been at Cayce recently in a demolished condition in the yard office, is our information.

The COURT: You gave notice for him to produce the lantern, and it turns out the lantern was broken up. I do not understand how you can introduce a lantern that has been broken up.

Mr. MONTEITH: The information I had about it—not from this witness—that the lantern was over in the Cayce yard office a short time in a badly demolished condition.

The COURT: Go on.

24 Q. Who was the man that found Mr. Koennecke?
A. The general impression——

Mr. LYLES: I object to the witness testifying about general impression.

The COURT: Not competent.

Mr. MONTEITH: Mr. Koennecke acted under your instruction?
A. Yes, sir.
Q. You sent him from track 8 to track 3?
A. Yes, sir.
Q. And he had to cross over the tracks in the yard, including No. 4, and while he was in the act of going over there somewhere this train backed in from Columbia, backed into tract 4——

Mr. LYLES: I object; leading.

The COURT: Yes, that is leading.

Mr. MONTEITH, repeating: He had crossed over these tracks?

The COURT: This witness was there, he ought to know, just ask him.

Mr. MONTEITH: You sent him from track 8 to track 3?
A. From track 8 to track 3.
Q. Did he have to cross over track 4 to get there?
A. Certainly.

The COURT: He has done said so.

Mr. MONTEITH: Where were you when you sent him, with reference to the point he was killed, how far?

A. I don't know exactly the distance, just across from track 3 to 8 when I was talking to him. I don't know the exact distance across the track.

Cross-examination by Mr. LYLES:

Q. Mr. Barker, you were what they call yardmaster?
A. Yes, sir.
Q. That is, you had charge of the switch engine and its crew?
A. Yes, sir.
25 Q. Who was engineer of that train 419 on this night?
A. Beecher.

Q. Who was fireman?
A. I do not remember who the fireman was.
Q. What switchman did you have?
A. J. T. Koennecke and Charlie Brown.
Q. Brown, he is colored?
A. Yes, sir.
Q. Now, Mr. Barker, before engine 423 came in with these cars you had taken cabs off track 3?
A. Yes, sir.
Q. That was train No. 67?
A. Yes, sir, from the north.
Q. And it came from Hamlet, N. C.?
A. Yes, sir, as I understand.
Q. You took a cab off that train and took it over to track 8?
A. Yes, sir.
Q. And while you were over there—then when you left track
Q. You had left the rest of train 67 on track 3?
A. Yes, sir.
Q. Train 67 had, before you started on those cars at all, and had pulled those cars on track 3, and that engine had cut off and left cars there for you to break up?
A. Yes, sir.
Q. You had taken cabs to track 8, while you were over there with these cabs—what were you going to do with the cabs?
A. Had some local cars on 9. To catch those cars and put them on cabs to go north the next morning.
Q. That was the train that went back to Hamlet?
A. Yes, sir.
Q. In the meantime, while you were there with that cab, extra 77 came in from the south?
A. Yes, sir.
Q. And came on track 3?
A. Yes, sir.
Q. You had left the rest of train 67 on track 3?
A. Yes, sir.
Q. That caused engine 77 to stop?
A. Yes, sir.
Q. It was up to you to take those cars off 3 so engine 77 could come through and go to the roundhouse?
A. Yes, sir.
Q. You say 77 came in and stopped on track 3, the same
26 track you left those cars on; you told Mr. Koennecke to go back and get those cars off 3?
A. Yes, sir.
Q. When he got those cars you were to break them up and put them in tracks they were to go out?
A. Yes, sir.
Q. Then engine 419 actually switched on and got back on track 3 and coupled with these cars?
A. Yes, sir.
Q. At the time it did that, you understand when it first got there,

track 8, and coupled up, those cars were some distance down track 3, toward the south?

A. No, sir; they were pretty close to the north end clearing; they were not right at the clearing.

Q. When engine 419 coupled up, it started to pull the cars out?

A. I don't know whether it pulled head in or not.

Q. It was after the engine came around back from track 8 to track 3 that 423 came in?

A. Yes, sir.

Q. It was Mr. Koennecke's duty to see that the engine was properly coupled up?

A. Yes, sir.

Q. Mr. Koennecke having left track 8 he had already gotten back to track 3 before engine 423 came in?

A. Yes, sir.

Q. Now, after they started to pull, 419, after 419 coupled up to the cars on 3, 423 was coming in?

A. From Columbia.

Q. Going south?

A. Yes, sir.

Q. Coming back from Columbia on 423, it took the main line across the river?

A. Certainly.

Q. And down until it got to the yard; at what point with reference to the yardmaster's office did 423 leave the main line?

A. Some little distance, this side of the yard office.

Q. North of the road crossing?

A. Yes, sir.

Q. At that point, it is what they call the north switch?

A. Yes, sir.

Q. The first switch that leaves the main line?

A. When they cross over the north lead switch at Congaree River.

Q. After 423 left the main line, left the track, it was off
27 the main line so far as the movement was concerned?

A. Yes, sir.

Q. At the time 423 came up, running four to six miles an hour, at the time 423 came up, 419 was standing still, clear of switch on track 3?

A. Yes, sir.

Q. At that time engine 77 was standing still while 423 was moving up?

A. Yes, sir.

Q. No. 423, with the cars it had, was the only train in motion at this point?

A. Yes, sir.

Q. Do you recollect whether engine 77 had an electric light on?

A. Yes, sir.

Q. It was burning?

A. Yes, sir.

Q. They give a bright light?

A. Yes, sir.

Q. That engine was standing still some distance south on track 3?

A. Yes, sir.

Q. You don't know whether 423 had a headlight on the rear as it came in or not?

A. No, sir; I do not recollect.

Q. Didn't you examine the engine soon after the accident?

A. Thirty minutes.

Q. Was the headlight burning then?

A. Yes, sir; burning all right.

Q. Was the headlight on the front of the engine burning?

A. Yes, sir, at that time.

Q. A switch engine has two headlights?

A. Yes, sir; both at the front and rear.

Q. Do you know the fireman on 423, colored man?

A. I have seen him.

Q. Do you know where he is now?

A. No, sir.

Q. Do you know whether he is living now or not?

A. I heard he was dying.

Q. Now, you say there were lights in the yard, electric lights around? And was one on the sand house; that house is almost opposite to where Mr. Koennecke is supposed to have been killed?

A. Yes, sir.

Q. That is a big light?

A. It was a large light.

28 Q. Now, have you had considerable experience in the switching service?

A. Not very much; since '03 is all I have had.

Q. You have been in this work at other yards besides the Cayce yard?

A. Yes, sir.

Q. How long had Mr. Koennecke worked in the Cayce yard?

A. I don't know the exact time he came there, but some time in February.

Q. And he had been engaged in similar duties, since he had been there up to the time he was killed?

A. Yes, sir.

Q. Do you know whether he worked for the Southern in a similar capacity before he came with the Seaboard?

A. I think so; I don't know it to be a fact.

Q. As a matter of fact, speaking from the standpoint of a man engaged in the switching crew, from your experience in such matters, is it practicable to use electric lights in the switching yard for lights?

A. No, sir.

Q. Tell us if that is not for the reason we have a switch that cuts off the light and throws shadows; that is correct?

A. Yes, sir.

Q. As a matter of fact, don't you gentlemen as switchmen—wouldn't you prefer not to have any electric lights?

A. If I wanted it at all I would want them high electric lights, as the lights they give, the shadows blind us.

Q. Did you have any complaint to make about the number of lights in the Cayce yard at the time it happened?
A. No, sir.
Q. Anything wrong in the yard with the lights?
A. No, sir.
Q. They were all right from a switching standpoint?
A. Yes, sir.
Q. Had you walked on the walkway between 3 and 4; had you before this happened?
A. Yes, sir.
Q. Did you see anything wrong with that?
A. Between 3 and 4?
29 Q. Yes?
A. Nothing wrong at the place Mr. Koennecke was injured.
Q. Anything there to cause a man to stumble and fall?
A. No, sir; not between the tracks.
Q. You stated you did not know whether there was any man on the rear of engine 423, on the front the way it was going, when it came back there or not?
A. I do not know.
Q. Is there any rule which required a man to be on the rear of switch engine backing in the yard?

Mr. MONTEITH: We object.

A. None I have seen.

Mr. MONTEITH: The rule is the best evidence.
The COURT: He can state whether he knows there was such a rule or not, but he cannot say what was in the rule; the rule is the best evidence.
Mr. MONTEITH: It ought to be produced.
The COURT: He can state whether he knows of such rule or not.
Mr. LYLES: The question is going to arise on the application of this rule. They admitted—over my objection, your Honor has admitted, and the question is going to arise whether your Honor is going to rule that out. How are you going to do it without knowing the situation?
Mr. TOMPKINS: If the rule is in writing governing the movement of this train——
The COURT: The only question is whether he knows of such rule or not; so far as that goes it is competent, simply to say whether he knows of such rule or not.

Mr. LYLES: Are you familiar with Rule U in the time table; do you know what Rule U is?
A. I think I do.
Q. You heard counsel read it to the jury?
A. Yes, sir.
Q. Tell the Court and jury whether that rule applies to switch engines; whether that rule applied to engine 423 at the time it is supposed Mr. Koennecke was run over by it.

Mr. TOMPKINS: We object.

30 The COURT: Let me see the rule.

Mr. TOMPKINS: He can tell what 423 is, whether the rule was in force or not; but whether it applied or not is a question of law. (Rule handed to the Court.)

The COURT: That rule seems to be general, Mr. Lyles.

Mr. LYLES: But look where it comes from. It is in the time table, which applies to a particular department of the road, general instruction for that department.

The COURT: If you have a rule in your book that supersedes that——

Mr. LYLES: I have not got it. My information is this does not apply to switch service.

Mr. TOMPKINS: Is not there a rule there that shows where it applies?

Mr. LYLES: Is not. Did not the witness testify this time table had no application except in main line service, and that a switch engine on the main line was subservient to these rules and regulations; and as soon as the engine left the main line and came in the yard service it came under a different department without rule and regulation to control?

The COURT: He has stated that has no application to switch service.

Mr. LYLES: Answer the last question.

Mr. TOMPKINS: Whether 423 was or not a main line service switch engine is a question this witness has no right to decide.

The COURT: If he knows that of his own knowledge he can answer.

WITNESS: Can't say.

Mr. LYLES: I will ask, after 423 left the main line have they a man on the back of the tender?

Mr. MONTEITH: We object.

The COURT: That rule is general in its application; don't say switchman, or what.

31 Mr. LYLES: You have testified the time table applies to main line service?

A. Yes, sir; does not apply to engine in the yard service.

Q. And none of these instructions apply to engines in the yard service?

A. No, sir; not within the yard limits.

The COURT: You allege it was negligence on the part of the defendant company to back this car in there without having anybody on it to notify people of its approach; that will be a question of fact for the jury, whether under the circumstances, even outside of the time table, it was encumbent to do a thing of that sort.

Mr. MONTEITH: You are entirely correct, but to show the rule strengthens our position; the reason we wish it in there to show, and contain it does apply.

The COURT: I do not see much difference between you all.

Mr. TOMPKINS:

Q. Mr. Barker, Cayce is between Columbia and Savannah?
A. Yes, sir.
Q. A station on the road?
A. Yes, sir.
Q. If I understand you correctly, you testified that Cayce was in North Carolina Division; did you mean to say that?
A. Under the North Carolina Division superintendent.
Q. Did you notice on this paper that it says, Seaboard Ry., S. C. Division, between Columbia and Savannah, Savannah and Jacksonville, Jacksonville and River Junction, and branches?
A. Yes, sir.
Q. Your idea of that differs from that time table?
A. Yes, sir.

The COURT: He said both were the same, anyhow.

Mr. TOMPKINS: Now, Mr. Barker, at the time that you sent Mr. Koennecke across to track 3, did he perform any duty—did I understand you to say he performed duty on track 3 before he was killed?
A. No, sir; I did not say he performed any duty.
32 Q. I understood you to say he connected an engine?
A. No, sir; I did not say that.
Q. Do you know whether he ever got to track 3 or not?
A. No, sir, I could not say whether he ever did or not.
Q. What duty did you send him to perform?
A. I went to track 8, where Mr. Koennecke was, the engine was there, and Charlie Brown; I told him to go to 3 and pull the cars out to let extra 77 get to the roundhouse; whether Mr. Koennecke ever got there I could not say.
Q. What train had he gone there to get?
A. No. 67, from Hamlet, local freight.
The COURT: He has already testified to that.
Q. The track was 77?
A. On track 3.
Q. Facing north?
A. Coming from south, headed north.
Q. Was track 67?
A. Track 3.
Q. How was it headed?
A. South.
Q. Do you know how far engine 67 was?
A. The engine had been there some time; he had cut off and gone to the engine house.
Q. I mean the cars?
A. I do not know.
Q. The lights you speak of as being near the station there was an arc light?
A. No, sir; I did not say anything about near the station; I said near track 4.
Q. What part of track 4 was that light?

A. It was near 4 switch, where the track leads in from the lead on the yard tracks, starting off from the lead.

Q. The light was how many car-lengths from where Mr. Koennecke was killed?

A. I could not say, just across the yard from 4; had a light on the sand house and one on the coal chute.

Q. What kind of power lights were those?

A. I do not know.

Q. How big a globe?

A. Large size globe.

Q. Not an arc light?

A. No.

33 Q. You testified those lights were down low; suppose those lights were placed high?

A. I did not testify that those lights were low; I testified the lights in the yard were placed low and the cars would throw a shadow over.

Q. Suppose placed high?

A. If placed high would be a great advantage to the yard, I said that; but those lights were placed high.

Q. If the arc lights were like those used in the city, would throw more light and be of more benefit?

A. Yes, sir; if placed high enough above the box cars.

Q. You were subpœnaed by the attorneys for the plaintiff?

A. Yes, sir.

Q. Have you been in consultation with Mr. Lyles, attorney for the railroad, since you have been here?

A. No, sir.

Q. Had you been in consultation with him before that?

A. No, sir; never met him until on the street, he said he wanted to see me; this morning I saw him.

Q. Did he discuss the facts of this case with you?

A. No, sir; not specially; spoke to me about the case coming up, said to meet here at 9:30.

Q. He wanted you here?

A. Yes, sir.

Q. They have you subpœnaed?

A. Yes, sir.

Q. Have you discussed the case with any of their claim agents?

A. No, sir; I do not know any of the Seaboard claim agents.

Q. How long had Mr. Koennecke been in the service of the Seaboard?

A. Since some time in February.

Q. Had he the same position during that time, switchman all the time?

A. I could not say.

Q. You don't know?

A. No, sir; he was not hired as a switchman, but as yardmaster I understand, night yardmaster.

Q. At that season of the year state whether or not the railroad had reduced its force over in that yard?

34 Mr. LYLES: We do not see that that has any bearing on the case.

Mr. TOMPKINS: We ask this question to bring out the point that he had at times occupied more remunerative and more responsible positions than he was at that time, they switched him up and down.

Mr. LYLES: Just ask the witness the question.

Mr. TOMPKINS: Oh, well, you objected to it. That train coming in from Columbia which is supposed to have killed Mr. Koennecke, had how many car boxes?

A. I don't know; I suppose about 18.

Q. Some of those boxes were still on the main line when he was struck?

A. No, sir.

Q. Are you sure about that?

A. Yes, sir.

Q. Where were you standing?

A. At track 3.

Q. Was the place he was killed as much as 18 car lengths from the main line?

A. Yes, sir.

Q. He appeared to have been dragged some distance?

A. Not over two car lengths, something like that.

Q. Now, this train was the last train that had come over the main line into the yard, wasn't it at that time?

A. Yes, sir.

Q. They had the right of way over the main line at that time; and do you know why they took that track 4 at that time?

A. Yes, sir. That was the only track open at that time.

Q. Was it for the purpose of getting off—clearing the main line?

A. Yes, sir.

Q. Was there light sufficient in the yard at that place for the fireman or engineer to have seen a man on the track?

A. Yes, sir.

Q. If he had been looking out?

A. Yes, sir.

35 Recross-examination by Mr. LYLES:

Q. You said the lights in the Cayce yard were placed up high?

A. Yes, sir.

Q. In the proper position?

A. Yes, sir.

Q. And they gave plenty light at the place where Mr. Koennecke was struck?

A. Yes, sir.

Q. Nothing to keep him from seeing engine 423 there?

A. No, sir.

Q. How about the electric headlight on extra 77; wasn't that making things so bright you could pick up a pin?

A. Made things bright.

Q. You say 423—engine 419 had come to couple the cars on train 67?

A. Yes, sir.

Q. If Mr. Koennecke was attending to his duty—his duty required him to be there next to the engine?

A. Yes, sir.

Q. He had plenty of time to get through before 423 came in there?

A. Yes, sir.

Q. No. 67 came in from Columbia, didn't stop at Columbia?

A. No, sir.

Q. Brought the cars there solid?

A. Yes, sir.

Q. You took the cars out of that train and set them on the tracks, and those coming to Columbia you brought back to Columbia?

A. Yes, sir.

Q. Those going to Savannah and Jacksonville you put in trains going there, and those going to Hamlet you put in trains to go there; that is what 419 went backing that train for?

A. Yes, sir.

Mr. TOMPKINS: The complaint in this action does not allege, it does not allege specifically that Mr. Koennecke was killed in the interstate service. Counsel for defendant have brought out from this witness, who seems to be familiar with the surrounding facts, the movement of these trains and the duty of Mr. Koennecke. The facts, in our opinion, make this case governable by the Federal Employers' Liability law. Realizing that, we think it proper at
36 this stage of the case to offer an amendment to our complaint, which will allege he was in such service.

Anticipating this might be done during the trial, we have our motion reduced to writing.

The plaintiff hereby moves to amend the complaint as follows:

1. To amend paragraph two (2) by adding after the word "Railway," on line 7, the words "from the City of Hamlet, North Carolina, to the City of Savannah, Georgia, through the States of North and South Carolina and Georgia."

2. To amend paragraph three (3) thereof by adding after the words "South Carolina," on the last line of said paragraph, the words "and was engaged in switching cars, making up and breaking up trains running and operating between Columbia, in the State of South Carolina, and Hamlet, in the State of North Carolina, and between Columbia, in the State of South Carolina, and Savannah, in the State of Georgia, the said trains carrying freight between those points."

The COURT: I would like to state my views about this matter. Under Lord Campbell's Act, originally passed in 1859—before that time if a man was killed through the negligence of another, the action died with it—but in '59 Lord Campbell's Act was passed; since that time it has been amended in various ways. One time it was amended by allowing a party to sue for punitive damages; the Supreme Court held before that time could only recover compensatory damages; that was the law that controlled in the matter where a party was killed by the negligence of another that such action was

brought for the benefit of the wife and child or children, &c., by the administrator. The Supreme Court held it was not a survival of the old action, a new action for the benefit of the beneficiaries of the deceased. In '08 Congress passed a law known as the Employers' Liability Act, which superseded the State law entirely, super-
37 seded Lord Campbell's Act, where the party was engaged at the time in interstate business. They have extended that very far. One case where a man was going down and took the number of a freight train that was coming in from another State; they held that the Act applied even to a case like that. Now, where a party is not killed a different rule applies, in this way,—strikes out certain defenses, for instance, the defense of contributory negligence, does not allow that; but when it comes down to a death action, absolutely supersedes the State law, and gives a new cause of action by the personal representative for the benefit of all parties dependent on him for support. But you cannot recover punitive damages, the only thing you can recover is actual damages. You allege and claim punitive damages in this complaint; all of that would have to come out, and then you would have to allege, under that Act you would have to allege he left a widow and left children who were dependent on him for support. There is one case where they held, where the daughter was married and was not dependent for support, that it was not proper to include her in the case. I do not know who he left dependent on him for support, but in drawing the complaint, under that Act of Congress, you will have to follow it, which states you can only recover compensatory damages.

Mr. TOMPKINS: We, of course, after the amendment, shall not ask for punitive damages; your Honor can charge that out; don't think it necessary to change the complaint on that. We have alleged in this complaint facts which would bring it under that Act so far as the beneficiaries go.

The COURT: Where is that?

Mr. TOMPKINS: Paragraph 7 (paragraph 7 read). We have looked into that matter carefully. We are confident under this complaint we can prove to what extent each one was dependent on him.

Your Honor would have to instruct the jury, it is for them to
38 find a verdict—apportion it out. We anticipated this might happen. We have gone over the complaint very carefully. We think the amendment which we offer is all that would be necessary for this Court to try under the Federal law, and give such expression to that Act as the decision of the Supreme Court requires. We ask to allow us to amend the complaint in the particulars asked in the motion.

The COURT: What do you say, Mr. Lyles?

Mr. LYLES: As I understand, the question before the Court is the motion to amend the complaint, by changing the cause of action from one under the Lord Campbell's Act to one under the Act of Congress known as the Federal Employers' Liability Act. My position is your Honor has no power under the practice of this State to grant this motion.

The COURT: I do not care to hear further from you on that. That

is substantially an entirely different cause of action. You can amend during the trial, provided it does not substantially change the cause of action, and you will have to do that. You cannot stand on this complaint as it is now; it is an entirely different action. During the trial of a case the Judge cannot substitute an entirely different action. As Mr. Lyles says, it is as different as anything could be; it is an entirely different cause of action. I would not have jurisdiction to do that.

Mr. TOMPKINS: That question has been pretty well threshed out by the United States Supreme Court. The text-book writers take this position, that where a change is made, an amendment is made——

The COURT: Let me suggest to you, this is not an amendment; you cannot amend a suit brought under Lord Campbell's Act so as to bring it under the Act of Congress. When an action is brought under the State statute, and the other under the Federal statute, that is substituting an absolutely different action. Your suit is brought technically under Lord Campbell's Act——

Mr. TOMPKINS: Under the United States Lord Campbell's Act, too.

The COURT: You do not allege that at the time this party came to his death that he was then engaged in interstate traffic, interstate commerce. Our Code says you cannot substitute one cause of action for a different cause of action. You make it under the Act of Congress. That is not an amendment, but a new action.

Mr. TOMPKINS: Will your Honor hear argument on that?

The COURT: Yes, sir.

Mr. TOMPKINS: This does not change a single fact in our case. We have not alleged that this was intrastate business; we do not allege whether intra or interstate, nothing said about that; but if they wished to take advantage of that they could have made us make it more definite and certain. We come into Court with a complaint, and do not say what law it is brought under, whether interstate or intrastate. The rule of law which we will contend for and ask the Court to invoke is not the rule for proving the case at all, but the rule of law which governs the amount of damages—distribution damages; don't affect the cause of action—same cause of action—exactly like the law in both interstate and intrastate; but the rule of law that applies in one case is the Federal Act, and the rule of law that will apply in another is the State law.

The Supreme Court has allowed and refused amendments, but they have set out in a decision the distinction which they make. I think if your Honor will listen to the case you will see that this amendment is properly made, and made at the right time, and I see no reason why we should be thrown out, and forced to bring a new action, and wait a long time to have it brought in Court again when it can be tried under this amendment. The Court has the right during a trial to amend a complaint in so far as the same may be necessary to conform the pleading to the proof. This action is being tried by the State Court, and will be governed by our rule; is a discretion allowed the Court; in making this amend-

ment, will not be governed by the rule of the United States, but by our own rule.

The COURT: I throw this out as a suggestion,—you do not name the children.

Mr. MONTEITH: Yes, sir, we do; we name them by name.

Mr. TOMPKINS: Paragraph 1.

The COURT: All right, go ahead. Do you allege they are dependent on him for support?

Mr. MONTEITH: We say for their benefit. (Argued fully.)

The COURT: Since hearing argument I am satisfied that the State, having complete control over the whole matter—pleadings—would have the right to allow the amendment. But when a party comes into Court, with your complaint, expecting to meet a trial of the cause under Lord Campbell's Act, and you switch off to try him under the Federal law—if Mr. Lyles says he is not ready to proceed, I will allow you the amendment, and you can take it up on the 8th of July. I think it right the amendment should be allowed, and if Mr. Lyles says he is not ready, not prepared to meet the issue, will take it up later. When I read the complaint I thought right off, I said this is going to be a case under Lord Campbell's Act. Had all the features of it. While you do not refer to the Act, not necessary to refer to it; but still you sue for punitive damages; I thought it was a case under Lord Campbell's Act. Here is a matter I might say, you have to prove who is dependent on him for support, which ones of the children; that raises a fact you might have to look into. One child might be entitled to more than another child, and it is a question of proof, to what extent they are dependent.

Mr. MONTEITH: We understand the recovery is limited.

41 The COURT: The only question is whether or not this amendment is of such character as ought not to be allowed during the progress of the trial. I am satisfied the Court has complete control over the whole subject, has the right to allow an amendment, but whether the character of this amendment, taking it that you are going to switch from one law, and try it under another law,—whether or not that is such an amendment as the Court ought to allow, and has the power to allow under the law.

Mr. MONTEITH: You want to know whether Mr. Lyles is prejudiced by going to trial?

The COURT: The Supreme Court has held in three or four cases that a judge has the power to allow an amendment during the progress of a trial, if it does not change the cause of action; in a case in 46 S. C. vs. Mfg. Co., Judge Townsend said he did not have any power to allow the amendment, merely making a change in the allegation, by alleging the machine was at one place instead of at another place. The Supreme Court said you had the right to do that during the progress of the trial. But I do not know of a case like this, where you change the law. You are going to presume Mr. Lyles knows the law; I do not know whether he does or not.

Mr. MONTEITH: I am satisfied Mr. Lyles knows the law.

The COURT: He may or may not, but you are going to change the whole thing; you are going to try the case on these facts and under

a different law. He might say he did not come prepared to try it under that. I will hear you on that.

(Argued.)

The COURT: I will not dismiss your case. The only question is, is this a proper case; are there any authorities in this State to meet a case like this, where you change some essential facts and bring in a new law to govern, is that such an amendment as ought to be
42 allowed in the trial? I will not think of dismissing your complaint. I think you are entitled to the amendment.

Mr. LYLES: The point I make is: under our procedure the Court has no power to grant the amendment. If your Honor rules you have the power, then the question comes up, are you going to exercise that discretion, and the question of surprise will be for me to make.

Plaintiff's counsel called particular attention to allegations in the original complaint as to dependency, and also to the statute known as Lord Campbell's Act, and stated that they believed the case could and should be tried under either the State or the Federal law, according to the evidence as developed on the trial, without the complaint being amended at all.

The COURT: After hearing Mr. Tompkins—he made a very clear statement of the law to me on that—I am inclined to think possibly he would not have had to amend his complaint at all. I am inclined to think now I will have the power to do that, and so hold; but if you say that you cannot go to trial and that you are taken by surprise I will not force you to trial.

Mr. LYLES: If your Honor rules you have the power to make the amendment, before we get to the question whether you are going to grant it or not, I submit I am entitled to a nonsuit in the case, on the question of power. We are entitled to go forward with this trial on the pleadings as they now stand; and if they are not going forward I think I am entitled to a nonsuit as the case now stands. That is to keep this record straight on the question of power to grant the amendment. I am convinced the Court has no power to grant it.

The COURT: He is not through putting in evidence.

Mr. TOMPKINS: If this case goes on, and is tried, we will want counsel to have the benefit of his objection. He has the right to carry his case to the United States Court, and if he reverses
43 us there it would be much more favorable to him than if he got a nonsuit; but if we took a nonsuit and stopped we could bring this case over, which we would have the right to do. If counsel is impressed with his own authorities it strikes me he would sit back and let us go on; and if he reverses us in the United States Supreme Court——

The COURT: The Supreme Court of the United States would not hear any matter until after final judgment.

Mr. TOMPKINS: We are representing the widow and children of Mr. Koennecke. Your Honor can see we have gone to a great deal of expense and trouble; all the witnesses are here, and it is probable we would never be able to bring them here again; probably some

of them may go out of the country. If your Honor should decide against us, or put us off to the next term, you might deprive us of a right which in law we ought to be entitled to.

The COURT: I have ruled on that. Testimony has been developed that goes to show this man was engaged at the time in interstate business, and you ask to amend your complaint so as to conform to the proof. I conclude I have the power to allow the amendment, and so hold; but I would not like to force counsel on under those conditions, if he says he cannot go safely to trial.

Mr. TOMPKINS: If he convinces the Court that he cannot go safely to trial, that he will be prejudiced by this amendment, he should be required to present to this Court reasons, and he has failed to do it. I do not think he is entitled to come in Court without doing this. He is an attorney and ought to be prepared to try this case under the law which it is triable under.

The COURT: When this matter was first mentioned I was inclined to think it was such an absolute difference as to demand a dismissal of the complaint. After hearing argument and decision of the Supreme Court of the United States, and thinking over the
44 matter, I have changed my views on that; and the question comes up whether or not the Court had the power to allow the amendment during the progress of the trial. Well, testimony came out, Mr. Lyles brought it out himself on the stand, and I think, under the law, the testimony having been brought out, that you should be allowed to amend the complaint, if you think it advisable to do so, so as to conform it to the facts, and allege he was engaged in interstate traffic.

Now, Mr. Lyles took the position that the Court has no power to allow the amendment. He says it will have to be tried under the Federal law. When I read the complaint I concluded it was a suit under Lord Campbell's Act. If counsel says that he has been misled, that this complaint led him to believe that he came here for the trial of this case under the law as laid down in Lord Campbell's Act, and if he has been taken by surprise by the questions of fact you propose to insert in your complaint, and on account of the fact, it is being tried under a different rule, laid down by Congress and construed by the United States; if he says that, he being an honorable member of the bar, I will grant a continuance; if he does not say that we will have to go on with the case. Do you say, Mr. Lyles, that you are taken by surprise; if so, I don't think I ought to force you. I have decided I have the power, and I think the amendment ought to be allowed, and the case ought to proceed, unless you say, on account of the change, you will be taken by surprise.

Mr. LYLES: If your Honor requires me to speak I will be careful in what I say. I cannot say I am not familiar with the Federal Employers' Act of Congress. I am not prepared to meet the issue this change of dependency will bring out.

The COURT: If you cannot do it——

Mr. TOMPKINS: That is a matter which we think could very well

be made between now and the time we finish our case. It
45 strikes me this being in your Honor's discretion, it would be hard on us to require this good lady to go out and spend money to bring the witnesses back here, and be delayed in the trial of her case, simply on the question of dependency on the party who was killed. If he is prepared on the other phases of this case. He said he was prepared on everything except dependency, which I suppose means dependency of the children of Mr. Koennecke on him. The complaint alleges all these facts, and he knows the law that will be applied in this case; and if he is prepared for that law, he must have known we would have to prove the dependency. If your Honor pleases, I do not think, on a little quibble like that, that the rights of litigants should be put aside, and that they should be required to go out and spend a great sum of money to bring these witnesses here. In the last paragraph of the complaint we allege that Mr. Koennecke left his wife, the plaintiff, and his four children who were dependent on him for support.

Mr. LYLES: I would like to be heard on that point. It appears from this complaint that one or more of these children are married. That makes no difference under the Lord Campbell's Act of our State; makes a most essential difference under the Federal Act. Also one or more of the children are boys, maybe they are working and supporting themselves; makes no difference under the State Act, but under the Federal Act. Two boys and a young lady beneficiary, either one of these three may be working and supporting themselves. I have not been called on, and there is no reason why I should have been called on to have that question investigated on the complaint I am brought here to meet.

The COURT: I told you if you are not ready to go to trial in this case I will not force you.

Mr. LYLES: I am not ready to go to trial. I am not ready to meet the issue of dependency.

46 Mr. TOMPKINS: We wish to announce that we do not claim that J. F. Koennecke, the young man who has just begun to work for himself, and the married daughter are entitled to any recovery whatever. We propose to prove that the widow, and the young son who is in school, and the unmarried daughter, who lives with the widow, are entitled to the proceeds of this verdict. Mrs. Watson, and this young man, we propose to prove that they were not dependent on their father for support, and that he did not contribute to it; but that he did contribute to the minor son and his young unmarried daughter, who is a minor, and his widow. That takes from him the very question he ays he is not prepared to meet. We are entitled under the law to a trial; your Honor should use discretion in the furtherance of justice, and not in the furtherance of a technicality. We ought to go on, as it will be disastrous and expensive, and will prejudice the rights of this plaintiff to have this case go over this term.

Mr. LYLES: How do I know how much Mr. Koennecke contributed to his family; how do I know that this other young lady is not working and supporting herself; how do I know the other young

man is not working and supporting himself? It may be very true that they will testify as to the truth of the matter, perhaps they will, but we are entitled to a preparation of the issues, and on the evidence; we cannot go on the presumption of other people, that they will testify the truth; our right is to have an investigation made to meet it.

The COURT: Proceed with the trial of the case. Counsel ought to have known that this question would come up anyway.

Mr. LYLES: I do not want to get on the record wrong.

The COURT: You had the opportunity to continue the case, and would not avail yourself of it; it is not my fault. I left it in your hands, and you would not avail yourself of it. I was going
47 to continue the case, if you had said, under the circumstances, you could not go to trial.

Mr. TOMPKINS: We have not had the order prepared or signed.

The COURT: I will fix that. Understand it is amended that way.

Mr. LYLES: I would like to have the order and amendment.

The COURT: I will consider that signed. Go ahead.

His Honor then signed and filed the following:

Order.

This was a motion made during the trial of the above entitled cause on the part of the plaintiffs to be allowed to amend their complaint with certain regards, as set out in the motion, which is filed in the case.

After hearing argument pro and con and on statements made in open Court, I feel that this amendment should be allowed; and it is, therefore,

Ordered, 1. That paragraph two of the complaint be, and the same is hereby, amended by adding after the word "Railway," on line seven of the complaint, the words "from the City of Hamlet, in North Carolina, to the City of Savannah, Georgia, through the States of North Carolina, South Carolina and Georgia."

2. That the complaint be amended in paragraph three by adding after the words "South Carolina," on the last line of said paragraph, the words "and was engaged in switching cars, making up and breaking up trains running and operating between Columbia, in the State of South Carolina, and Hamlet, in the State of North Carolina, and between Columbia, in the State of South
48 Carolina, and Savannah, in the State of Georgia, the said trains carrying freight between those points."

W. A. HOLMAN,
Presiding Judge.

Columbia, S. C., May 21, 1914.

D. A. SPIRES (white), sworn, says:

Mr. MONTEITH:

Q. Where do you live?
A. Been living in Columbia last few months, but gone to Jacksonville to live now.
Q. Who have you been employed by recently?
A. Been working for the City of Columbia.
Q. Were you employed by the Seaboard in June, '13?
A. I was.
Q. What about your duties?
A. I was flagging at that time.
Q. Ran from where?
A. Ran from Cayce to Jacksonville, down to Savannah, run each way; from Cayce to Savannah and Savannah to Jacksonville.
Q. Did your train come into the Cayce yard on the night Mr. Koennecke was killed?
A. Came in that evening.
Q. Where did your train stop, where did the cab stop?
A. The cab of the train I came on was left in the yard; I was on the cab that night making out reports, down in the south end of the yard?
Q. Did you leave the cab?
A. When I finished my report.
Q. When you came up the yard did you notice any train backing in there?
A. I did.
Q. Any headlight on it?
A. No headlight.
Q. Anybody on the rear of it?
A. No one on the rear of it.
Q. Shortly after that train—what track was that backing in on?
A. Track 4.
49 Q. What train was that?
A. That was engine 423, coming over from Columbia, I suppose.

Mr. LYLES: I object. He testified he supposed.

Mr. MONTEITH: Engine 423?
A. Yes, sir.

Mr. LYLES: I object to that.

Mr. MONTEITH: Was it engine 423?
A. 423.
Q. Did your engine pass you as you were walking up the yard?
A. Yes, sir.
Q. Shortly after that engine passed was your attention attracted to anything?
A. Yes, sir; I heard something under the train, I could not tell whether a man, something hollered. I found it was a man under the train.

Q. Was that the train that was backing in?
A. That was the train backing in.
Q. Did you hear this man calling for anything?
A. I heard him calling for——

Mr. LYLES: I object.
Mr. COBB: Anything that happened at that time is part of the res gestæ.
The COURT: Go ahead. Isn't that part of the res gestæ?
Mr. LYLES: I do not see how it is.
The COURT: The Supreme Court in one case, a man was shot and he immediately exclaimed that some one had shot him.
Mr. LYLES: That was in a criminal case.
Mr. COBB: We do not insist on it.

Mr. MONTEITH: Your attention was attracted by the call?
A. Yes, sir.
Q. Did you discover that some one had been run over?
A. Yes, sir.
Q. Did you run up in the yard and give the alarm?
A. I told Mr. Warmack was a man, I told him; I didn't know at that time who it was.
Q. Did you afterwards learn who it was?
A. I found out it was Mr. Koennecke.
50 Q. Had you noticed Mr. Koennecke before you heard him call?
A. I had not.
Q. You were not working with Mr. Koennecke?
A. Was not.
Q. And your cab was in the south end of the yard?
A. South end of the yard.
Q. You were walking up towards the station?
A. Toward the office.
Q. The train that was backing in, was it going in an opposite direction to which you were walking?
A. Opposite direction to which I was walking.
Q. Have you ever been a switchman in the Cayce yard?
A. I have.
Q. What have you to say about the condition of the yard there as walkways for employees?
A. The yard now is in fairly good condition, was when I was switching there.
Q. Not as level as it was, the time Mr. Koennecke was killed?
A. Cinders piled in the walk, couldn't walk between the tracks, came from being dumped out, left them in piles, and had not got level at that time; but the yard now is in fairly good condition.
Q. You know that condition existed where Mr. Koennecke was killed; did that condition exist at the point where Mr. Koennecke was killed?
A. I will not say positively, but that was the way the whole yard was, you might say; of course was some level spots in there, but I don't know the place where he was killed, how it was.

Q. You have seen them unload clinkers and coal there?
A. Yes, sir; just shoved them between the aisles, by dumping out there, and left them in piles, sometimes about two feet high, sometimes level.

Cross-examination by Mr. LYLES:

Q. The condition that existed in Cayce yard at the time
51 Mr. Koennecke was killed had existed there some time?
A. Yes, for some time.
Q. Mr. Koennecke had been employed as switchman some time there?
A. I think so; he had been there some good while.
Q. How long before this had you been switchman?
A. I was not switchman before that. I was flagging on the South Carolina Division. I have switched there since then.
Q. Where did that engine pass you?
A. Some eight or ten car lengths from the switch-off from the lead.
Q. That was over in the yard?
A. Over in the yard.
Q. It was coming in track 4?
A. Yes, south end of the yard, in track 4.
Q. What train did you come in on that night?
A. Extra that evening.
Q. Where did you come from?
A. From Savannah.
Q. What time did you get there?
A. At Cayce?
Q. Yes?
A. I don't know what time I registered for.
Q. Rather funny you do not know anything about the train you came on, yet you know the number of the engine that ran over Mr. Koennecke. You had to make out report?
A. Yes, sir.
Q. You have to set out in the report the number of the train you came up on?
A. Yes, sir. I haven't got that report to look at.
Q. You haven't got the report of 77?
A. I didn't come on 77.
Q. You haven't got the report?
A. No, sir.
Q. You know Mr. Bloom?
A. Yes, sir.
Q. You stole Mr. Bloom's mule down there?
A. No, sir.
Q. Didn't you admit to him you had stolen it?
A. No, sir.
Q. Didn't your friends get him not to prosecute you for it?
A. No, sir; I didn't know anything about it.
Q. You know Mr. Bloom?

A. Yes, sir.

52 Q. He had you indicted for it?

A. Yes, sir; on suspicion.

Q. You admitted to him you had stolen it?

A. No, sir.

Q. And got him to drop the case?

A. No, sir.

Q. You know Mr. Hurley?

A. Yes, sir.

Q. Mr. Hurley discharged you from the service of the Seaboard?

A. He did.

Q. Discharged you from the service because you were asleep on duty?

A. Yes, sir.

Q. You have kind of got it in for the Seaboard?

A. I've worked for the Seaboard since then.

Q. You didn't make a notation in writing of the engine that ran over Mr. Koennecke?

A. I did not.

Q. You haven't got a notation of the train you came up on?

A. No, sir.

Q. Yet you made a report of the cars?

A. Yes, sir.

Q. You cannot remember the number of that train, or the number of the engine?

A. I cannot remember the number of the engine.

Q. You remember the number of the engine that ran over Mr. Koennecke?

A. That has been talked of often since then.

Q. How did you happen to notice there was no headlight on the engine?

A. It was coming toward me.

Q. Are you willing to swear you recollect that, or don't remember about it?

A. To my knowledge was no headlight.

Q. Do you know whether there was or not?

A. I will not swear to it, but to my knowledge was no headlight.

Q. Will you swear to that?

A. I will not.

Q. You say you do not know where Mr. Koennecke was standing at the time just before he was killed?

A. I do not.

Q. You will not undertake to swear that the ground at the place he was standing was uneven?

A. I would not swear to it.

Q. Were places in that ground where it was all right?

A. Some places.

53 Q. You wouldn't swear he was standing at a place where it was rough?

A. No, sir. I would not swear to it because I did not see where he was standing.

Redirect examination by Mr. MONTEITH:

Q. What electric lights were in the Cayce yard at this time that you know of?
A. Wasn't in the yard, some off from the yard.
Q. What sort of light was *light?*
A. I do not remember much about the light.
Q. You are not prepared to tell us the location of the different lights?
A. No, sir; I did not pay attention to them.

Mr. LYLES:

Q. You say you do not remember about the location of the lights?
A. I do not.
Q. You would not undertake to say what Mr. Barker said about the location of those lights is incorrect?
A. I would not say anything about the lights.
Q. You do not mean to testify about the lights, how many there were, or anything like that?
A. No, sir; I don't remember about the lights.

WM. WITHERS (white), sworn, says:

Mr. MONTEITH:

Q. You are a railroad man, are you?
A. Yes, sir.
Q. Did you ever switch over to Cayce yard?
A. Yes, sir.
Q. Did you go to work there soon after Mr. Koennecke's death?
A. Some time after.
Q. How long?
A. About three months.
Q. You were not there at the time. Had you been to Cayce about the time Mr. Koennecke was killed?
A. Yes, sir.
54 Q. You know about the condition of the yard?
A. Like all other new yards.

Mr. LYLES: I object. The witness did not start to work there until three months after.
Mr. MONTEITH: He testified he had been over there.
The COURT: Let him answer about the yard.

Mr. MONTEITH: Were those walkways uneven or smooth?
A. Some places were rough, some places smooth, owing to the condition the section master had it in.
Q. You have had considerable experience as a switchman?
A. Right smart, yes, sir.
Q. You ever switch between Columbia and Cayce?
A. No, sir; not between Cayce and Columbia.

Cross-examination:

Q. When you say the yard—in the first place, you don't know where Mr. Koennecke was killed?
A. No, sir.
Q. You don't know the condition of the point where he was killed?
A. No, sir.
Q. You don't know, of course, whether the ground there was smooth or rough?
A. No, sir.
Q. Now, the place you noticed as being rough, clinkers, you mean little uneven?
A. Where they unloaded the clinkers.
Q. Of course, where the car unloads clinkers there is a pile there until it spreads out?
A. Yes, sir.
Q. But where the ground had been prepared, it was all right then?
A. Yes, sir; where it had been worked down.
Q. You would not undertake to say as to the condition of the walkway where Mr. Koennecke was killed that night?
A. No, sir; not that night.
Q. May have been perfectly all right, so far as you know?
A. So far as I know.

55 J. F. KOENNECKE (white), sworn, says:

Mr. MONTEITH:

Q. You are a son of Mr. Koennecke that was killed?
A. Yes, sir.
Q. Did you go over to Cayce right at the time your father was killed, or the next day?
A. About two or three days after.
Q. Was the place pointed out where he was killed?
A. Yes, sir.
Q. What track was that on?
A. I understood between 3 and 4.

Mr. LYLES: We object. Evidently the witness is acting on information.

Mr. MONTEITH: We withdraw that. Did you see blood on the track where he was run over?

A. Yes, sir.
Q. It was pointed out as the point he was run over?
A. Yes, sir.
Q. Did you make some kodak pictures of the place?
A. Yes, sir.
Q. Between the tracks; are these the pictures you made?
A. Yes, sir.

Mr. LYLES: I do not think those pictures are competent. Not identified here as the place where Mr. Koennecke was killed.

The COURT: He said it was pointed out to him.

Mr. COBB: He said he saw the blood there.

Mr. LYLES: You have to identify a thing before you put it in evidence, cannot put it in by information given by other people. The pictures are small—kodak pictures—almost impossible to tell anything from them.

The COURT: Let me see them. (Handed to the Court.)

Mr. COBB: We have proved Mr. Koennecke was killed in the Cayce yard; we have proved there was blood at the spot where
56 he was killed. We are endeavoring to prove by this witness he had the place, where the blood was, pointed out to him, and he took pictures of the walkway between the tracks at that place.

The COURT: Did you see spots of blood there?

WITNESS: Yes, sir; and found toe-nails and flesh.

(Kodak pictures offered in evidence.)

(It is agreed that the original pictures may be exhibited to the Supreme Court by either side, and filed as exhibits in this case.)

Mr. MONTEITH: What was the condition of the walkway as you saw it there?

A. Was some holes all right; between the crossties seems to have been where there was something before that, and washed holes under there, and clinkers there also, several piles of clinkers, some hard clinkers, had been there some time, and the rain soaked in and make it stand.

Q. In the pathway?

A. Yes, sir. Also a couple of pins lying on the side where I saw blood and bone and toe-nail and such as that; it seemed in a bad shape right there.

Q. You have testified you are a son of the deceased?

A. Yes, sir.

Q. You are not claiming any benefit under this case?

A. No, sir.

Q. Your name should be stricken out as a beneficiary under the Act?

A. Yes, sir.

Q. You are working and taking care of yourself?

A. Yes, sir.

Q. And were at the time of your father's death?

A. Yes, sir.

Q. Did you live at home?

A. Yes, sir.

Q. You work and take care of yourself?

A. Yes, sir.

Cross-examination:

Q. You spoke of, said there were some holes there next to the crossties; what sort of holes?

A. Washed, where the rain probably came in and washed where the clinkers was.

57 Q. That entire yard is built out of what they call cinders, clinkers?

A. I don't think all built out of clinkers.

Q. Those were walkways you found in Lexington County?

A. Yes, sir.

Q. You know that is in a sandy section?

A. Yes, sir.

Q. Don't you know they made the ground hard, beat the clinkers in that sand?

A. I don't know; they usually do that. Holes between the crossties, where the rain came in there and soaked down.

Q. That was between the crossties?

A. Yes, sir; outside near the rail.

Q. You mean in between the rails?

A. Yes, sir; and the rails between the crossties.

Q. The crossties stick up above the raised ground?

A. Yes, sir.

Q. The crossties not covered up?

A. No, sir, not all.

Q. What tracks?

A. 3 and 4.

Q. Those holes you mean were where the crossties were raised upon the ground?

A. Some lower than others.

Q. Wasn't filled in between the rails, between the crossties, is that what you mean?

A. Yes; never had been filled in, just holes in there.

Q. You mean the holes you saw were in the pathway?

A. Some in the pathway, and also between the rails, between the crossties.

Q. On the track?

A. On the track and in the pathway.

Q. What was your father doing at the time he came to his death?

A. I understand he was a switchman.

Q. Do you know how much he was making at that time?

A. I do not remember, making from $100 to $115, something like that, to $135; he was just temporary switchman; he was yardmaster; he took the position of night yardmaster; he was night yardmaster at first, then he was yard conductor; business fell off and made him switchman; probably that did not pay him as

58 much as yardmaster, but he was there temporarily working as switchman, probably two or three nights.

Q. How do you know that?

A. I understood that from him, and I understood it over there; I talked to several men over there.

Mr. LYLES: We do not want your understanding acquired through other people; do you know yourself how much your father made at the time he was killed?

A. Yes, sir; from $115 to $135.

Q. That is a good sum of money for a switchman to make?
A. He was not altogether a switchman; he was yardmaster and yard conductor.
Q. Didn't take a picture of a good long view of those walks?
A. I did take a picture of that.
Q. Where is that?
A. That did not turn out to be good. I took five altogether.
Q. You say these pictures are absolutely accurate?
A. Yes, sir.
Q. How did you make these so good and not the others?
A. I think was a little confusion there, people telling me which way to take that and how.

J. G. HAUCK (white), sworn, says:

Q. Do you live in Columbia?
A. I do.
Q. Were you living here June, last year?
A. I was.
Q. Do you remember about the time Mr. Koennecke is said to have been killed at Cayce?
A. Yes, sir.
Q. Did you go there and look over the yard a day or so after the killing?
A. I went there 18th June.
Q. That was just after Mr. Koennecke was killed?
A. Yes, sir.
Q. Who did you go with?
A. Mr. Monteith and Mr. George Rembert.
Q. Did you go crossing the Seaboard?
A. I did.
59 Q. State whether or not you saw the place where there was some blood?
A. Yes, sir.
Q. Do you know what track that was on?
A. No. 4.
Q. Tell the jury what was the condition of the space or walkway between 3 and 4 and between the other tracks around and in the vicinity of the place or location where you saw blood on the track?
A. I went there to inspect the track; I got on track 4, or between 4 and 5, and between 3 and 4 was big piles of clinkers and cinders, and old irons, such as draw pins, coupling pins and clinkers, piled in some places that high (indicating), some so, some a little higher; looked like the road had thrown them down there and left them there.
Q. Just carried by a flatcar and dumped them off?
A. Yes, sir.
Q. What do you mean by clinkers?
A. Been burned in the engine.
Q. Around there was the condition soft or hard?
A. Big hard clinkers; some places some of it was soft.
Q. Some places sharp and would cut you?

A. Yes, sir; man could not walk in that place, would have to stop, would have to jump over different places.
Q. Something like jumping logs?
A. Yes, sir.
Q. You went there for the purpose of being a witness?
A. No, sir; to inspect the track.
Q. You went with Mr. Rembert and Mr. Monteith?
A. I went ahead of them first, next day with them.
Q. You went at their request?
A. I did.
Q. You went there 18th June?
A. Yes, sir.
Q. Did you find any piles of clinkers?
A. Yes, sir, between 3 and 4 and 4 and 5.
Q. Are you able to swear when these clinkers were put there?
A. No, sir, but looked — they had been there some time. I can swear one man working there told me he had——

60 Mr. LYLES: I object. The witness must only testify what he knows.

The COURT: Do not state what somebody else told you.

Cross-examination by Mr. LYLES:

Q. Are you willing to swear that the clinkers were there any length of time?
A. I could swear they were there two or three weeks ahead of that from the looks of them.
Q. How many piles?
A. They were maybe 200 or 300 on each side.
Q. Do you know where Mr. Koennecke was standing or walking before he was killed?
A. No, sir; I know where the blood was. I know where he was hit from the way he was dragged.
Q. Do you know what he had been doing, do you know?
A. No.

Mrs. R. B. WATSON (white), sworn, says:

Q. Are you a daughter of Mr. J. T. Koennecke?
A. Yes.
Q. Your husband is Mr. Stanmore Watson?
A. Yes.
Q. You married some time prior to your father's death?
A. Five years.
Q. You were not dependent upon your father?
A. No.
Q. You make no claim in this case?
A. None whatever.

No cross-examination.

Miss EDITH MAY KOENNECKE (white), sworn, says:

Mr. MONTEITH:

Q. Are you a daughter of J. T. Koennecke?
A. Yes, sir.
Q. How old are you?
A. 24.
Q. Have you always lived at home?
A. Yes.
Q. Were you living at home at the time of your father's death?
A. Yes.
61 Q. You, of course, are single?
A. Yes.
Q. Your father supported you?
A. He did.
Q. Have you any other means of support at all?
A. None whatever.
Q. Are you working out anywhere at all?
A. No.
Q. Are you working anywhere now?
A. No.
Q. You have no other source of income, but what your father gave you?
A. None whatever.

Cross-examination:

Q. How old was your father at the time of his death?
A. About 51 or 52.
Q. Fifty-two is correct?
A. I think so.

GEORGE KOENNECKE (white), sworn, says:

Mr. MONTEITH:

Q. Are you a son of Mr. J. T. Koennecke?
A. Yes, sir.
Q. Do you live at home?
A. Yes, sir.
Q. Always lived at home?
A. Yes, sir.
Q. Were you living there when your father was killed?
A. Yes, sir.
Q. Are you working out anywhere?
A. Work with the Record Company.
Q. Are you going to school?
A. Yes, sir; night school.
Q. Have you any source of income?
A. $2.00 per week.
Q. That you made at The Record?
A. Yes, sir.

Q. Where were you working at the time your father died?
A. Carrying route, Columbia Record.
Q. Are you carrying it now?
A. No, sir.
Q. Where are you working now?
A. The Record.
Q. How long have you been carrying the paper?
A. About three weeks.
62 Q. In the summer months?
A. Yes, sir; during the summer months.
Q. The amount you made carrying The Record, is that sufficient for your support?
A. No, sir.
Q. You stay at home, and get your meals furnished you?
A. Yes, sir.
Q. Do you pay any board?
A. No, sir.
Q. Your father gave you the money to buy your clothes?
A. Yes, sir.
Q. Gave you pocket money from time to time?
A. Yes, sir.

Cross-examination:

Q. What is your name?
A. George Allen Keonnecke.
Q. How old are you?
A. Seventeen years old.
Q. When were you 17?
A. March 24, 1914.

GEORGE KOENNECKE, recalled.

Mr. COBB:

Q. You say you have been going to school this winter?
A. No, sir; been working all winter.
Q. Since your father's death?
A. Yes, sir.
Q. Why have you been working since your father's death and not going to school?
A. Mother needed my support.
Q. And you needed it yourself?
A. Yes, sir.

Mrs. J. T. KOENNECKE (white), sworn, says:

Mr. TOMPKINS:

Q. What relation do you bear to the late J. T. Koennecke?
A. I was his wife.
Q. How many children have you?
A. Four.
Q. Name those children?

A. Mrs. Rosalie Watson, Edith May Koennecke, George Koennecke, Joe Koennecke.

63 Q. Are they the ones that have testified?

A. Yes, sir.

Q. What is the age of Miss Edith Koennecke?

A. 24 years old.

Q. And George Koennecke's age?

A. 17, 24th last March.

Q. Those are the children of Mr. Koennecke?

A. Yes, sir.

Q. You were only married once?

A. Yes, sir.

Q. You have been duly appointed administratrix of this estate?

A. Yes, sir.

Q. Where was Mr. Koennecke working at the time of his death?

A. Seaboard, at Cayce.

Q. Do you know what position he held there?

A. He first went there, was yardmaster; sent over there for him, he was yardmaster then; then he became yard conductor. Summer business got light, he was a new man, and accepted position of switchman during summer months.

Q. How much did he make at the time of his death?

A. From $125 to $135.

Q. How are they paid, by the hour?

A. Yes, sir, by the hour. He made dinner and supper hour always.

Q. During the time he was acting yardmaster, and the other position, did he get the same pay this time or more?

Mr. LYLES: We object; don't think that is relevant.

The COURT: You ought to be able to get out of the witness what salary her husband was getting.

Mr. LYLES: She has testified he was getting from $125 to $135.

WITNESS: Some months he made more.

Mr. TOMPKINS: When did you first learn of your husband's death?

A. About 10:30 at night.

Q. The day he was killed?

A. Yes, sir.

Q. What time of day did Mr. Koennecke work at the Seaboard?

A. He worked at night.

Q. What time at night, from what hours?

64 A. He generally left home every afternoon, had to catch the engine to take him, had to take the engine every afternoon six o'clock.

Q. Where was he the day he was killed, before he went to his work?

A. He was at home; he slept all day, to get up 5 o'clock.

Q. Do you recall the day he was killed?

A. It was the 13th of June, '13, on Friday.

Q. Now, Mrs. Koennecke, about how much money did Mr. Koennecke contribute to yourself and your children's support?

A. He gave me his salary every month, except a few dollars; part we took and divided among the children, pin money, that was regular every month.

Q. Those two children lived with you all?

A. Yes, sir.

Q. And ate at the family board?

A. Yes, sir.

Q. He had to pay for their clothes and schooling out of this money?

A. Yes, everything.

Q. Was Mr. Koennecke possessed of any other property?

A. No, sir.

Q. Was your minor son going to school at that time?

A. Yes, sir; he was very anxious for his education.

Q. What is he doing now?

A. Right now, working for The Record. I had to take him from school and put him to work.

Q. How old was Mr. Koennecke when he died?

A. 51.

Q. What state of health was he in?

A. Excellent health; he never was sick.

Q. Have you and your family any other means of support outside of his salary?

A. None in the world.

Q. His health, you say, was good?

A. Yes, sir.

Cross-examination:

Q. Wasn't Mr. Koennecke 52?

A. No, sir, 51.

Q. He had to pay for his clothes out of the money he made?

A. I got everything; he turned over his salary to me; I bought everything for the house that was needed.

65 Q. You bought his clothes for him?

A. Yes, sir. I had them sent to the house and he taken his choice of the clothes.

Q. The money he gave you, some of it had to go to clothe himself?

A. Yes, sir.

Q. Your husband worked for a short time with the Southern?

A. Yes, sir; long time.

Q. He was engaged while with the Southern in the service of switchman?

A. Yard conductor.

Q. He was engaged in yard service?

A. Yes, sir.

Q. He didn't go out on runs?

A. Sometimes he would go as far as Dent's.

Q. But his ordinary work with the Southern was yard conductor or switchman?
A. He never switched for the Southern; he was yard conductor.
Q. He went to work with the Seaboard about the 1st of February?
A. Yes, sir; he worked there seven months.
Q. While there he was engaged in yard work?
A. Yes, sir.
Q. In charge of yard engine, or worked with engine crew?
A. Yes.
Q. Switch work?
A. When he died he was switching.
Q. He had been there from about the 1st of February?
A. Yes, sir; worked there seven months.
Q. Your husband—was there anything wrong with Mr. Koennecke's eyesight?
A. No, sir; had good eyesight.
Q. Anything wrong with his hearing?
A. No, sir; he had good hearing.
Q. He was an active man?
A. Yes, sir.
Q. In good health?
A. Yes, sir.
Q. Good eyes and good ears?
A. Yes, sir.

(Rules 545, 547 offered in evidence.)

66 After Recess.

Mrs. KOENNECKE, recalled.

Mr. TOMPKINS:

Q. Did you go over to Cayce to inspect the spot on track 4, where your husband was killed?
A. Yes, sir; we went over there the day after the funeral.
Q. Who went with you?
A. Mrs. Robert Campbell, and all the children, and Mr. Koennecke's brother and myself.
Q. Did you locate the spot?
A. Yes, sir; it was marked with chalk, cross mark.
Q. Did you see any blood?
A. Yes, sir; spot of blood one end and that much at the other end.
Q. Fresh blood?
A. Yes, sir.
Q. What was the condition of the space between the tracks at that point at that time?
A. It looked like as if they had been filling, didn't level it off, left it there, was a deep hole that deep and there was a pile of clinkers where not level, some filled up, some not.
Q. What kind of substances was those clinkers?
A. Anything; old pieces of iron.

Mr. TOMPKINS: State whether or not your husband was accustomed to give his children fatherly advice?
A. Yes, sir.
Q. And assisted them in their education?
A. Yes, sir, he did.

Cross-examination by Mr. LYLES:

Q. I do not know whether I asked you how many years your husband had worked with the Southern?
A. I don't know the number of years.
Q. Eight, ten or fifteen?
A. As far as I remember; we have been here, I do not know exactly, over 13 years, maybe 14 or 15 years. He had been
67 working all the time for the Southern Railway until he went to the Seaboard, and was off one month from the Southern.
Q. You know Mr. Koennecke was discharged by the Southern?
A. I heard he was.

Mr. TOMPKINS:

Q. What is your age?
A. I will be 46 years old 1st of June.
Q. You are in good health?
A. Yes, sir.

Mr. TOMPKINS: We offer Rule 102; we have already offered 545 and 547 in the same Rule Book.
Mr. LYLES: We object to that; not applicable to the case.
Mr. TOMPKINS: The testimony was that the tender was in front of the engine, and the engine was pulling a string of cars. I think that rule applies.
Mr. LYLES: My objection is there is no evidence in this case of any cars being pushed by the engine. So far as the contention that it was a car, it has been expressly decided by the United States Supreme Court that a tender is not a car.
Mr. TOMPKINS: I withdraw the question if he takes that position.
Mr. LYLES: I just take the legal position.
Mr. TOMPKINS: Under the head of Yardmaster, I will read Rule 545:
"They will see that no yard engineman, yard conductor or yard brakeman is allowed to work in the yards under their control after a new time table is in effect until he has been supplied with and has receipted for a copy thereof."
Rule 547: "They must see that their yards are kept in good order, that scrap and other material scattered upon the ground are promptly collected and stored, and that nothing is allowed to remain upon or between the tracks that involves risk to property or persons."
68 It is stipulated that the Rule Book from which these rules were read may be exhibited by either party in the Supreme Court and filed as an exhibit in the case to the extent that the record shows that it was introduced.

Under this time table which we have introduced and is referred to in that rule, which controls the running of cars:

"SEC. U. Cars will not be moved in front of engine, or engine moved backward, unless there is an employee on the front of the moving car, or on the rear of the engine, to keep a lookout, in the direction the movement is being made, to avoid striking persons or obstructions on track. Enginemen as well as conductors will be held responsible for violation of this rule."

The above and foregoing Rule U was taken from a pamphlet entitled:

"Seaboard Air Line Railway,
South Carolina Division,
between
Columbia and Savannah, Savannah and Jacksonville,
Jacksonville and River Junction (and Branches).

Time Table No. 2.

Taking Effect at 12:01 P. M. Sunday, April 27, 1913.
Superseding Time Table No. 1, Dated Jan'y 5th, 1913.

For the Government of Employees Only.

Not Intended for the Information of the Public, nor as an advertisement of the Time of Trains. The Company reserves the right to vary therefrom as Circumstances may require.

69 Central Standard Time.

H. W. Stanley, Assistant General Manager.
C. E. Hix, Superintendent Transportation.
H. W. Purvis, Superintendent."

And is found on the page of said pamphlet entitled "General Instructions."

It is agreed that Time Table containing Rule U. may be exhibited by either party in the Supreme Court and filed as an exhibit in this case.

We offer in evidence mortuary table which appears in the Code of 1912, Vol. I, Sec. 4014. We offer in evidence this section:

"In all civil actions or other modes of litigation whenever it shall be necessary to establish the expectancy of continued life of any person from any period of such person's life, whether he be living at the time or not, the table hereto appended shall be received in all courts and by all persons having power to determine litigation as evidence, with other evidence as to health, constitution and habits of such persons of such expectancy represented by the figures in the columns headed by the words completed age and expectation respectively."

The completed age here, according to the testimony, is 51; the expectancy is 20 years and 20-100.

We have one other witness as to the condition of the grounds which will probably be similar in a way to the testimony of Mrs. Koennecke. She lives in the country and has not yet arrived, otherwise we are ready to close the case for the plaintiff.

The COURT: That probably would be accumulative on that point.

Mr. TOMPKINS: We will close with the privilege of putting her up as soon as she comes in.

70 Mr. LYLES: I do not like the continuity of my evidence broken into.

Mr. TOMPKINS: We have sent for the other witness; we are anxious to get on with the case. We will not ask the Court to wait longer. We will close the case for the plaintiff. We put in the Rule Book and Time Table.

Mr. LYLES: I do not understand any rule has been put in evidence except what was read.

Mr. TOMPKINS: We introduce the whole Time Table in evidence. We read Rule U to the jury. Any point that may be made, we will read such parts as may be necessary.

Mr. LYLES: I object to that.

Mr. TOMPKINS: We will rest on the Record on that.

The COURT: I think we understand what is in evidence.

Mr. LYLES: I understand the plaintiff has closed.

The COURT: Yes, sir.

Mr. LYLES: Before I proceed with my case, your Honor has, over my objection, amended this complaint, and has forced me to trial on the statement I was not ready to meet one of the most material issues in the case. I do not know what sort of pleadings we have in that complaint. I have been engaged in the trial since the amendment was allowed; I do not know where I stand. To be fair, I do not wish to do anything in any way to amount to a waiver of the position I took. I think it up to your Honor to inform me what my pleadings are. The complaint has been amended, and nothing said about the answer.

The COURT: As I stated in the outset, I think this complaint was intended to be drawn under Campbell's Act passed upon our State statute. The testimony developed in the course of the trial that this man at the time was engaged in interstate business. This Act of Congress is a somewhat anomalous law; it breaks in on the State law. Suppose a case were to arise where it would be a disputed question as to whether or not the party was engaged in

71 interstate business. Of course United States Court judges have more latitude about passing on a question of fact, and if that should happen the judge would have to charge the jury both laws, State and Federal, and allow them to find the fact, which law applied. That, of course, does not arise in this case. I am going to tell the jury, the question of punitive damages, inasmuch as they have amended the complaint, I will tell the jury the question of punitive damages is eliminated; and also based on the law of negligence; if they should find for the plaintiff, all they could find would be for three of the parties, and they would have to proportion it out between them as to what they were entitled to.

You set up a general denial, that would go to the question of defeating any recovery, if the jury are not satisfied——

Mr. LYLES: I am not admitting the plaintiff's case, that this man was engaged in interstate commerce.

The COURT: The only difference would be on your defense, on the question of contributory negligence. That question might arise in this case. If the jury were to find that both parties were negligent, and that the negligence of both co-operated together, combined, as the proximate cause of his death, then they should only give half damages,—in other words, to mitigate it to the extent of culpability of the parties. That is what I understand the law to mean; and on the question of the assumption of risk, common law rule applies, and I will charge that, it is a contracural relation between the parties, and if his work there was the ordinary risk incident to his employment, then, of course, he contracted and assumed that risk; he did not contract and assume any negligence; I will charge the jury that; I will tell the jury in the outset that before they can find anything against you at all, Mr. Lyles, they would have to find, by the preponderance of the evidence, that the defendant was guilty of negligence; if they were to conclude that the plaintiff has not made out the case by the preponderance of
72 the evidence on that issue, then they would stop right there and find a verdict for the defense.

Mr. LYLES: Before you get to that. Your Honor has allowed them to amend the complaint——

The COURT: So far as that is concerned, he is bound by it.

Mr. LYLES: I deny these allegations.

The COURT: I know you do. You have the right to have them proved. I do not know a case like this. Suppose a disputed question of fact arose, I could not pass on that, then I would have to charge the law both ways; how else would you do it?

Mr. LYLES: Got to take one horn of the dilemma, can't grab both; can't consider the State law and switch to the Federal law.

Mr. TOMPKINS: We deny that that has to be met when the case is closed.

The COURT: Mr. Lyles takes this position: if it were to turn out, if the jury were to find, if the jury were to conclude your man was not engaged in interstate business at the time, then they would find for the defendant. I reckon that is true.

Mr. TOMPKINS: When the case is over and the evidence is all in the Court is not supposed to try the case to meet captious objections and technicalities of the attorney.

The COURT: I think that is right, for this reason: there has been a lot of litigation over this matter in the Supreme Court of the United States, not altogether clear about it. I think, analogous to the case cited, they allowed the beneficiaries to bring suit themselves; in that case they did bring suit under the State law, and the beneficiaries joined in the suit against the railroad, the doctrine of fellow servant applied in that State, and they lost the case, the jury found a verdict for the defendant; they carried it to the Supreme Court of the State of Pennsylvania, and that verdict was sustained.

73 Then after that they brought suit in the State Court, personal representative, alleging this matter fell under the Liability Act; the railroad said, but you have had one trial of this case, you had your beneficiaries come in and bring this suit, now you have got the administrator bringing the suit under the Liability Act; the railroad said that the party is barred; the State Court held it was, the Supreme Court of Pennsylvania held it was, and it went to the Supreme Court of the United States, they held it was not barred. In analogy to that, if the jury were to find this man was engaged in intrastate business instead of interstate business they would have to find a verdict for the defendant; that would not prevent you, I presume,—not passing an opinion on that—bringing the case over under Campbell's Act—I will not express an opinion on that, but it seems to me that would be right, I am not saying you could or not.

I am rather inclined to think this a complicated matter. I am inclined to think that I will have to charge, if they were to find as a matter of fact that this party was engaged in intrastate business, they would find, under the pleadings now amended, they would have to find a verdict for the defendant.

I think under the Pennsylvania case—you see what the Supreme Court of the United States did in that case.

Mr. TOMPKINS: If he took the position——

The COURT: Under that case, if you were to base your case on the principle that this was interstate business, that this man at the time was engaged in interstate business, and they deny it—which they do deny—it follows if the jury were to find against you on that—I think you can bring suit over—but I am not expressing an opinion on that. This is a very complicated matter.

74 *Defendant.*

W. S. BENTON (white), sworn, says:

The COURT: If he denies, which he does, that this man was engaged in interstate business I would have to charge the jury, if they found that was not so, they would have to find a verdict for the defendant, and what you could do after, I am not saying.

Mr. TOMPKINS: Suppose he claims something which we will admit?

The COURT: Your witness on the stand this morning testified, as I understand, that this man at the time was engaged in shifting cars, to make up the train that way, going beyond the limit of the State. If that is so, under a recent case, where they held, a man going down and taking down the numbers as well as the cars, that he was engaged in interstate business; the Supreme Court of the United States extended it as far as they could. If that is so this man would be engaged in interstate commerce.

Mr. TOMPKINS: Let's cross that bridge when we get to it.

The COURT: He denies your complaint.

Mr. LYLES:

Q. You are an employee of the Seaboard?
A. Yes, sir.
Q. On the night Mr. Koennecke was killed, June 13, 1913, you were engineer of 423?
A. Yes, sir; I was.
Q. Well, now, will you start and tell the jury all you did with 423 from the time you left Columbia until you got in Cayce that night?
A. We left Columbia with about 20 cars.
Q. What was the position of those cars?
A. We were pulling cars, running backwards.
Q. The engine was running backwards?
A. Yes, sir.
Q. You went across to Cayce?
A. Yes, sir.
75 Q. What was the first stop you made?
A. I think we went all the way to the yard, first stop was north switch at Cayce.
Q. Was that the point where you left the main line?
A. Yes, sir.
Q. How far north of the yardmaster's office would you say that is?
A. About 10 or 12 car lengths.
Q. Now, Mr. Benton, who was your crew on that engine that night?
A. Mr. Hunt was conductor, Sellers and Hamlet were brakemen.
Q. Who was the fireman?
A. Gibson.
Q. Where is he?
A. Dead now.
Q. Was he a colored man?
A. Yes, sir.
Q. As you left the main line and went up into the yard do you know where Hamlet was?
A. I left the main line and went in the yard, he was on the back step.
Q. In front of the engine——?
A. Either he or Sellers.

Mr. TOMPKINS: Do not lead; he has not said that. Leading question on a material point.

Mr. LYLES: State whether or not when you went into the yard there was any one on the footboard with the engine?
A. There was.
Q. Who was it?
A. I think Hamlet, I will not be sure.
Q. Was Mr. Hamlet one of the switchmen of that engine?
A. Next to the conductor.
Q. Was Hamlet a switchman on that engine?
A. Yes, sir.

Q. And Gibson was fireman?
A. Yes, sir.
Q. As you went into track 4—did you stop before going in 4?
A. Yes, sir.
Q. For what reason?
A. Switchman got off the engine to throw the switch.
Q. Do you know where 419 was as you went in track 4?
A. We stopped about the crossing. I think he came out
76 with a cab taking it back to some other track, we stopped until he got out of the way and we pulled back in.
Q. You pulled in, where was 419?
A. I think standing on 3.
Q. Was that standing still?
A. Yes, sir; he went back and stopped until we pulled by.
Q. That was standing still?
A. Yes, sir.
Q. Do you know whether that was the engine with which Mr. Koennecke was connected?
A. Yes, sir.
Q. Was another engine on that track 3?
A. No. 77.
Q. Where was that standing—was a headlight on that?
A. Yes, sir; electric headlight.
Q. As you went over there were headlights on your engine burning?
A. Yes, sir.
Q. How many headlights did you have?
A. Two, one on each end.
Q. Was the one on the back end of the engine in the direction in which it was going?
A. Yes, sir.
Q. Was that headlight burning?
A. Yes, sir.
Q. Are you positive of that?
A. I know it was burning.
Q. What was your speed as you went past 419?
A. Between 4 and 6 miles an hour.
Q. Did you see anybody there?
A. No, sir; I did not.
Q. As you passed over the crossing south of where this thing happened, what was your fireman, Gibson, doing?
A. Ringing the bell.
Q. What did he do after that?
A. He got down, began firing.
Q. Just explain to the jury what you mean by his getting down?
A. He got off the seat from which he was ringing the bell, he stepped down, quit ringing the bell and began to fire.
Q. Where did that put him with reference to the tender and cab on the engine?
A. He could not see at all, he could not, outside, then.
77 Q. Tell us what was the movement of the train as you passed track 4 opposite 419?

A. Backed on in and stopped as soon as got in the clear.
Q. What did you do?
A. Cut the engine off, went back to the other end this track, and came through 2—one and two.
Q. Where did you first hear Mr. Koennecke was killed?
A. About ten minutes after.
Q. As you were passing—did you afterwards see the point at which he was struck?
A. Yes, sir.
Q. As you were passing along by train that was coming with 419, did you hear any warning from anybody?
A. No, sir; somebody signed me down and told me somebody was caught up under the car.
Q. Was that while you were on track 4?
A. After I left track 4.
Q. When you passed over it?
A. Did not hear a thing.
Q. Did you know you had run over Mr. Koennecke?
A. No, sir; not until ten minutes after.
Q. Your fireman is dead?
A. Yes, sir.
Q. Are you familiar with Rule U in the time table?
A. Yes, sir.
Q. Tell us whether that rule applied to a switch engine when in the yard and off the main line?
A. Does not.
Q. Any requirement in the rule that there should be any one on the rear of a switch engine?
A. Not in the yard.
Q. State whether or not there was some one on the rear of your switch engine until you cleared the main line?
A. Was.
Q. How long had you known Mr. Koennecke?
A. I did not know him personally; I knew him when I saw him.
Q. He had been working there some time as a switchman?
A. He had.
Q. You know the point at which Mr. Koennecke is said to have been killed?
A. Yes, sir.
78 Q. What was the condition of the walkway there?
A. Smooth outside the track, but between the tracks, wasn't dirt between the tracks.
Q. You mean the crossties were exposed?
A. Yes, sir; but the walkway between 3 and 4, it was smooth.

Cross-examination by Mr. TOMPKINS:

Q. You pulled out from there the next day; you ran into that yard the next day?
A. No, sir.
Q. Where were you the next day?
A. I was running at night.

Q. You were there the next night?
A. No, sir.
Q. Where were you?
A. I was relieved. I was at Hamlet the next night.
Q. Did you stay here that night after the man was killed?
A. Yes, sir; I finished work at night.
Q. Where was that run?
A. Supposed to run at Hamlet; been running between Hamlet and Monroe.
Q. Where was your run when you ran over this gentleman?
A. I was running that yard engine. I am supposed to be on the main line; that night didn't have anybody to run and called me; didn't have anybody to run the yard engine that night and I was called for it.
Q. What did you do after this gentleman was killed?
A. Finished working the balance of the night.
Q. What?
A. What we had been doing before then.
Q. What was that?
A. Switching cars between here and Cayce.
Q. You were carrying cars over to Cayce and bringing them back?
A. Yes, sir.
Q. Did you switch any cars in that yard and leave them?
A. Leave them there and bring what was to come back here.
Q. You were running the engine which was transferring cars from Columbia yard to the Cayce yard?
A. Yes, sir.
79 Q. What time did you knock off that night?
A. Next morning at 7 o'clock.
Q. Wasn't that what was called in railroad circles an extended movement, Columbia to Cayce?
A. Yes, sir.
Q. That is what you were making?
A. I reckon so.
Q. This Time Table Rule U, and these rules in the Rule Book applies to all extended movements?
A. These in the yard limits between here and Cayce.
Q. Answer the question. Don't this rule govern you in all extended movements?
A. Except in yards.
Q. Can you have an extended movement in the yard?
A. I do not see how you could.
Q. Now, Mr. Benton, you say your fireman was on the footboard of your engine?
A. No, sir.
Q. What did you say?
A. I don't mean the fireman.
Q. Your switchman?
A. Yes, sir.
Q. Where was the footboard?

A. One on the front end and one on the back end.
Q. On the back of the tender?
A. Yes, sir. He was on the one back of the tender.
Q. Where did he get off there?
A. After he crossed the crossing at Cayce, public crossing.
Q. Where did he go then?
A. He got on. He ran back behind the engine until came to the switch and came in 4, and he changed and got on top of the car.
Q. Mr. Barker, when he said that he threw that switch, was mistaken?
A. I do not know who threw the switch.
Q. Mr. Barker testified he opened that switch up after you came in there?
A. I don't know who opened it up.
Q. Are you sure that the man got off there?
A. Yes, sir.
Q. At the time he got off there your car was on the main line?
A. One end was.
Q. How long did your car stay in 4?
A. I don't know.
Q. You unhitched your engine there and left it there?
A. Yes, sir.
80 Q. What did you do with the engine?
A. Went through the yard and came up through another track.
Q. And got other freight cars?
A. Yes, sir.
Q. And went back to Columbia?
A. Yes, sir.
Q. Look at these photographs. Do you deny that this photograph correctly represents the condition of that yard at that time?
A. I don't know whether it does or not.
Q. Looks like it?
A. I cannot tell.
Q. Were there not clinkers around on the ground like shown in the photograph?
A. I don't know; that was taken five or six days after.
Q. Will you swear these clinkers weren't over that ground as represented in that photograph on the night you ran over the man; will you swear they were not as represented on this?
A. No, sir.
Q. Were you working over there the next day or night?
A. No, sir.
Q. Clinkers are pretty hard things to walk on?
A. Yes, sir, pretty hard.
Q. Cut your shoes?
A. Yes, sir.
Q. Cut your foot?
A. I expect so.
Q. Throw you down?
A. Might.

Q. Fall down, hit your nose, liable to cut you?
A. Yes, sir.
Q. Sharp, hard substance?
A. Yes, sir.
Q. Now, there was plenty of light on the track back of your engine as you were pulling down the track?
A. My headlight was shining back there.
Q. That you had on the back of the tender?
A. Yes, sir.
Q. Describe what a tender is?
A. A tender is to carry coal and water in.
Q. Hitched on to the engine?
A. Yes, sir.
Q. How long is it?
A. About thirty feet.

Q. Could you see the back end of your tender; could you
81 see a man standing on the back end of your tender?
A. Yes, sir.

Q. While you were at your post?
A. Yes, sir. Those are sloped.
Q. Could you look over the window down the track?
A. I could see within a car length the back of the tank.
Q. You say your fireman was down putting coal in the engine?
A. Yes, sir.
Q. And your switchman got off before you got to that switch and got on top of the car?
A. Yes, sir.
Q. Was no one on the back end of that tender from the time you left the main line or he got off to throw the switch until you stopped your train on track 4?
A. No, sir.
Q. Why are you so sure your light was burning?
A. I saw it burning before I went in the track, and it was burning when I came back.
Q. You could not see?
A. I can sit on the engine and tell whether burning or not.
Q. You say you found Mr. Koennecke there about ten minutes after?
A. Yes, sir.
Q. How many cars had passed over him?
A. About ten, seven, eight or ten.
Q. What length were those car boxes?
A. Run from 34 to 40 feet.

Redirect examination:

Q. That engine 423, explain what sort of engine that was?
A. Was an engine, got a space on both ends.
Q. How about the tender of that engine?
A. Low tender, to see off the back, so can see anything behind you.

Q. As you were coming in track 4, you said your engine was backing?
A. Yes, sir.
Q. On which side of the engine were you sitting?
A. Right side.
82 Q. Could you from your seat on the right hand see a man standing over next to your engine toward track 3?
A. Yes, sir; I could see him if he was standing on the ground.
Q. Suppose he was standing near the engine, could you see?
A. If right at the engine I could not see him.
Q. If a man stepped in front of your engine from direction of track 3, could you see him before the engine struck him?
A. No, sir.
Mr. TOMPKINS: What kind of light — you have?
A. Oil lights.
Q. Both ends?
A. Both ends.

J. C. HUNT (white), sworn, says:

Mr. LYLES:

Q. What is your present position?
A. Yard conductor, Seaboard.
Q. On the night of June 13, 1913, when Mr. Koennecke came to his death, what was your position?
A. Yard conductor.
Q. What engine — you have charge of?
A. Engine 423.
Q. Who was your engineer?
A. Mr. Benton; Fireman Gibson; Hamlet and Sellers switchmen.
Q. Did you come over with the engine from Columbia to Cayce?
A. Yes, sir.
Q. Do you know the position of the men on that engine in making the trip over there?
A. Hamlet and myself rode the engine over there, Sellers rode to the rear.
Q. How was the engine going?
A. Running backwards.
Q. Where were the cars?
A. Ahead of the engine, the engine was pulling the cars.
Q. The engine was running south?
A. Yes, sir.
Q. What was the position of Hamlet on that engine?
A. To the best of my knowledge and recollection Hamlet rode back of the engine until we started to back into the yard;
83 near the yard office Hamlet got off the engine. I got off myself, too, to deliver the stuff and waybills.
Q. State whether or not by the position you located, was that in front of the engine, the way it was running?
A. Yes, sir.
Q. Where did you leave the main line?

A. At the north switch.
Q. How far north of the yardmaster's office?
A. About 10 or 12 cars.
Q. At the time Mr. Hamlet got off the engine had you left the main line?
A. Yes, sir.
Q. Were headlights on the engine—what sort of engine was that?
A. Standard switch engine, with headlights on both ends.
Q. How about the tender, with reference to the size of it as compared with the tender of the road engine?
A. The regular switch engine has a round tank to enable the engineer and fireman to see over the tank on the track, and not as high as the road engine tank.
Q. Are you positive both headlights were burning that night?
A. Yes, sir.
Q. Have you any reason to particularly impress that on you?
A. Not any particular reason, only that is is customary.
Q. Have you any trouble with headlights on this engine?
A. That was my regular engine. I had trouble a week or two before that; we got new reflectors for the headlights.
Q. Were they in there that night?
A. Yes, sir.
Q. Had been put in before that?
A. Yes, sir; about two days before this occurred when we got new reflectors.
Q. Tell the jury where the headlights on the tender of that engine are?
A. Set about middle way of the track.
Q. What sort of light?
A. Oil light.
Q. Does that give a lot of light?
A. Some give more light than others; when they are in
84 good shape, good lights; you can see an object, can see a car further than from here to the front door.
Q. Was in good shape that night?
A. Yes, sir, they were.
Q. When you left the main line and went up to go in track 4, do you know what was the position of engine 419?
A. Was in the clear, on No. 3.
Q. What direction was it facing?
A. North. It came out with cars behind it.
Q. Was it standing still until your train, 423, passed by and got in track 4?
A. I presume it was standing still.

Mr. TOMPKINS: We object.

Mr. LYLES: Was any other engine on track 3 to the south?
A. I learned afterwards——

Mr. TOMPKINS: We object.
The COURT: Just what you know.

Mr. LYLES: What was the speed of that engine as you passed in track 4 and along train 419?

A. Speed of 423 seemed to me four or five miles an hour.

Q. Did you know Mr. Koennecke?

A. Yes, sir.

Q. How long had you known him?

A. About ten years.

Q. Did you have anything to do with his coming to work for the Seaboard?

A. Yes, sir.

Q. When did he come over there?

A. It was the latter part of January, as well as I remember.

Q. 1913?

A. Yes, sir.

Q. From that time on until the time he came to his death was he employed in switching service?

A. First night yardmaster, from that to yard conductor, and then to switchman.

Q. Night yardmaster and night yard conductor, they have to cross the tracks?

A. Yes, sir. He has to cross tracks often in the discharge of, in the capacity of yardmaster.

Q. The duty of a switchman, did that take him up and down the tracks a great deal?

A. Yes, sir.

Q. How often would he pass track- 3 and 4?

A. Every night; some nights he would pass oftener than others.

85 Q. Would he pass over each one of those tracks several times every night?

A. He possibly would.

Q. How long have you had experience in yard service?

A. About twelve years.

Q. Are you familiar with the manner in which walkways should be fixed so as to be safe to employees?

A. I think so.

Q. Anything wrong with the walkway between 3 and 4?

A. I don't know exactly the condition at this place.

Q. Was the yard there in the same condition it had been in since Mr. Koennecke——

A. I guess in better condition than it had been, they were trying to improve it.

Q. It was in no worse condition?

A. No, sir.

Q. Mr. Koennecke had considerable experience in yard service?

A. Yes, sir.

Q. Are you familiar with that Rule U in the time table?

A. Yes, sir.

Q. Does that apply to switch engine in yard service after it left the main line?

A. No, sir, I did not take it that way.

Q. Is there any rule, custom or requirement that any switch engine that is backing in the yard, after leaving the main line, that there should be a man on the front end of it as it backs?

A. No, sir.

Q. Did you have a man there?

A. No, sir.

Q. You do not know the exact location of engine 77?

A. No, sir; do not know the exact location of it.

Q. Do you know whether the engine entered with a headlight?

A. After we pulled in,—when 419——

Q. Did that engine have an electric light on it?

A. Yes, sir.

Q. What direction was that engine headed?

A. North.

Q. That was in the direction Mr. Koennecke was killed?

A. Yes, sir.

Q. Did you notice whether that headlight on 77 was lighting up the ground along there where Mr. Koennecke is supposed
86 to have been killed, was it lighting up along there?

A. I don't know.

Cross-examination by Mr. TOMPKINS:

Q. You differ with Mr. Benton about where Mr. Hamlet got off?

A. I don't know whether I differ from him or not. He got off somewhere about the yard office.

Q. Didn't you tell Mr. Lyles he got off after the train had headed into the switch?

A. Yes, sir.

Q. You heard Mr. Benton say he got off and threw the switch; got off, ran along, threw the switch into the main line, and did not get back any more; did you hear Mr. Benton say that?

A. I haven't got anything to do with what Mr. Benton said.

The COURT: Did you hear him say that?

A. I don't remember whether Mr. Benton said that or not.

Mr. TOMPKINS: If he did say that, was that true; was that the fact?

A. I told you what I said was the fact; I said Mr. Hamlet got off the engine about the yard office.

Q. With regard to where they went into the switch, the north, or No. 4 switch?

A. Before we got to No. 4 switch the track switch sets at the corner of the yard office.

Q. You did not go in there?

A. No, sir; we went in No. 4.

Q. And he got off before you turned in 4?

A. Yes, sir.

Q. Then you did not mean to say that the engine was on the main line when he got off his position back of the train; the train was on the main line, wasn't it?

A. I cannot say whether the rear cleared the main line or not when he got off.

Q. Didn't the train go in on 4?
A. Yes, sir.
Q. Was he on the front of the tender footboard when you went in track 4?
A. I did not see the engine when in 4, I had gone in the yard office.
87 Q. How far was that from the switch that turned in track 4?
A. The yard office?
Q. Yes?
A. About 80 or 90 feet, I guess. Two switches from the corner.
Q. You got off and went into the office; where was Mr. Hamlet?
A. I don't know; I presume he got on top as customary for him to do.
Q. You saw him when he got off the footboard?
A. Yes, sir.
Q. Was your engine on the main line all that time?
A. No, sir.
Q. Where was it?
A. On the lead.
Q. Track 4?
A. On the lead before — got to track 4; lead is where all tracks come out into one.
Q. This train ran from the main line into the lead?
A. Into 4.
Q. And he got off after it turned into the lead, is that right?
A. Yes, sir.
Q. And before it turned in track 4?
A. Yes.
Q. Now, how far is that from the yard office?
A. I judge it to be ten or twelve cars.
Q. South of the yard office?
A. North of the yard office.
Q. You switch to the right going over that way?
A. As the lead goes in the switch goes to the right from the lead.
Q. The lead is to the right of the main line?
A. No, sir; to the left.
Q. From here?
A. Yes, sir.
Q. You have to cross the main line to get into the switches?
A. No, sir.
Q. Now, look at these photographs; one witness testified the photograph shows part of the yard where this accident occurred, and that is the photograph of it, about the time this accident occurred; is that about like as you remember it?
A. It may be like that, yes, sir; I do not consider that bad, though.
88 Q. The movement from Columbia. Mr. Benton testified you all were hauling cars from Columbia to Cayce yard, and from the Cayce yard back to Columbia yard?
A. We switched at Columbia and at Cayce; we did anything necessary to be done over there, or anything necessary to be done here.

Q. What were you doing that night?
A. Switching in Columbia, switched at warehouse, joint yard; I don't remember whether had anything to do with the cotton mill that night.
Q. Mr. Benton said you were carrying cars to Cayce and bringing another load to Columbia, is that right?
A. We did that every night.
Q. Answer the question, is that what you were doing that night?
A. When possible to do that; I do not know as we came right back or 4 or 5 o'clock in the morning when we came back; sometimes came back two or three times; sometimes didn't get back until—we did what was necessary to do.
Q. That movement, Columbia to Cayce, is known as an extended movement?
A. I would call it extended movement, Columbia to Cayce.
Q. This time table applies to it?
A. It applies, supposed to, to the main line.

H. E. HAMLET (white), sworn, says:

Mr. LYLES:

Q. What do you do now?
A. Yard conductor, Seaboard.
Q. In June, 1913, what were you doing?
A. Switching for the same company.
Q. The night Mr. Koennicke came to his death, June 13, 1913, with what crew were you connected?
A. Engine 423.
Q. Do you recall the trip you made to Cayce that night when Mr. Koennecke was killed, from Columbia?
89 A. No, sir, I do not know any special features of it I can recall on the way over.
Q. Where did your train leave the main line?
A. At the switch that enters the yard, 15 or 16 cars, switch known as leading switch.
Q. Called the north switch, too?
A. Whenever cross over the switch.
Q. You leave the main line, come to the lead track that slants to the left?
A. That is correct.
Q. And turn off the lead track as you come in?
A. Yes, sir.
Q. As your train turned off the main line that night—where were you riding that night?
A. I was on the engine as well as I remember.
Q. What part of the engine?
A. I would not attempt to say, I do not remember.
Q. As you pulled out the main line and went up, do you know where you were riding?
A. We stopped at the switch entering the yards; I got off there and rode on the footboard.

Q. You rode on the footboard near the place where you left the lead and went in track 4?
A. Yes, sir.
Q. That night as you went in the yard—how many headlights on that engine?
A. One was on there as we entered the yard, that is one was burning.
Q. Which one was that?
A. On the rear of the tank; one on south end of tank.
Q. Was that headlight in good condition?
A. It was.
Q. As your train went in, 423, do you know where engine 419 was?
A. Standing on track 3.
Q. Any other engine on track 3?
A. There was.
Q. What was that?
A. Road engine; I don't know the number.
Q. Tell us as you entered track 4, left the lead and went
90 in track 4?
A. That was just before Mr. Koennecke was killed, before the time he was supposed to be killed.
Q. The place he is supposed to have been killed at is about how far, approximately, from the switch of track 4?
A. I should say about eight or nine cars.
Q. As you went in track 4 was engine 419 moving?
A. It was not at the time we passed it.
Q. At that time engine on track 3, south, 419, was that engine standing or moving?
A. Standing still.
Q. Was there a headlight on that road engine on track 3?
A. There was.
Q. What character?
A. Electric headlight.
Q. Was it burning?
A. It was.
Q. In which direction was it throwing the light?
A. Throwing it north, the engine was headed north.
Q. That threw the light along by 419, up and down the track?
A. It did.
Q. That covered the place where Mr. Koennecke was supposed to be?
A. I could not say positively, I should say so, possibly five or six cars between the two engines.
Q. As 423 backed in track 4 at the time it is supposed Mr. Koennecke was run over was that the only engine in motion?
A. The only one I saw.
Q. Was it the only one of those three trains in motion?
A. Yes, sir; the only one of those three.
Q. The only trains on tracks 3, 4 and 5?
A. Yes, sir.
Q. What is the condition of that walkway between 3 and 4?

A. I don't know I could describe any difference in general character?

Q. Was it rough and uneven in there?

A. No, it wasn't perfectly level, some rough places in it.

Q. Anything there to cause a man to stumble and fall?

A. I could not say, I did not see anything.

Q. Have you done much switching in Cayce yard?

A. Been over there 14 months.

91 Q. The time you worked in the Cayce yard particularly?

A. I was on the engine, we worked both sides, both at Columbia and at Cayce; at the time of the accident I was on that for awhile last summer, possibly a month or two.

Q. Now, are you familiar with Rule U in the time table?

A. I am.

Q. Requiring a man to be on the front of the engine when pulling cars?

A. I am familiar with that rule.

Q. Does that apply to switch engine when not on the main line?

A. Never has been taken to mean such.

Q. Is there any custom or requirement that you should have a man on the switch engine in the yard doing switching work?

A. I never heard of it if it is.

Q. It has a headlight on the tender shining up the track, if the train is moving up and the headlight burning?

A. The light shines in the direction the engine is moving; supposed to be a light on each end.

Q. It lights up the track pretty well?

A. Yes, sir.

Q. Nothing to keep a man from seeing that?

A. Should not be if he has good eyes.

Cross-examination:

Q. What time of night was it?

A. About 9:35 or 9:40.

Q. That was the first time you had been over there that night?

A. It was.

Q. What time did you go back?

A. To Columbia?

Q. Yes?

A. I presume 4 o'clock the next morning; that was generally the time we came over.

Q. Do you remember the time you came over?

A. I do not.

Q. You were engaged in carrying loads to Cayce and bringing loads back here?

A. That was part of our work.

Q. Wasn't that what you were doing that night?

A. At the time of the accident we were taking cars from Columbia to Cayce.

92 Q. After your car stopped on 4, your engine was unhitched and carried round to hitch to another line of cars?

A. It was.
Q. And carried those cars back to Columbia?
A. No, sir.
Q. Then Mr. Benton was wrong?
A. Must be.
Q. You heard him testify?
A. I heard his testimony.
Q. He said that?
A. I would not pretend to say.

Mr. LYLES: I object to that method of examination.
Mr. TOMPKINS: I have the right to ask him.
Mr. LYLES: That is not a proper method of examination.
The COURT: Just ask what he knows about it.

Mr. TOMPKINS: I would not force the witness to answer something he does not know. Counsel is unduly excited about the matter. Did you hear what Mr. Benton said?
A. I did.
Q. Did he not say that when he unhitched the train of cars that they carried to Cayce, they hitched another train of cars and brought it back to Columbia?
A. I don't remember positively, I was not paying strict attention to his testimony; I don't know whether he said they brought them to the joint yard or to Columbia.
Q. Carrying them over there, that was an extended movement?
A. What do you mean?
Q. Carrying cars from Columbia to Cayce?
A. Yes, sir.
Q. That is known in railroad circles as an extended movement?
A. I don't know. It was entirely within the yard limits; the whole movement made was entirely in the yard limits; I do not know that it would be considered an extended movement.
Q. That place is in an entirely different county from this?
A. It is.
Q. It is across the river. How long is that trestle that crosses the river?
A. I should say about one-eighth of a mile.
Q. The trestle is longer than that?
93 A. You mean the long trestle; that trestle I should say must be a mile and a half or a mile and three-quarters long.
Q. That is on the trip between Columbia and Cayce?
A. Immediately after you leave Columbia.
Q. Now, you are familiar with the Seaboard Railway Time Table?
A. The part relating to our work, yes, sir.
Q. How far from Columbia to Cayce; look at this?
A. Three and one-half miles.
Q. By the way, is Cayce on the Columbia Division, or the South Carolina Division, or the North Carolina Division?
A. Cayce is the dividing point in the two divisions, the North Carolina Division ends at Cayce and the South Carolina Division starts here.
Q. Of both divisions?

A. Yes, sir.

Q. This time table is not exactly accurate about that when it says South Carolina Division between Columbia and Savannah?

A. Passenger train station at Columbia, that's the reason shows it from Columbia.

Q. Now, you say you got off about the lead, the lead switch, somewhere near the yard office; did you throw that switch?

A. I did.

Q. Did you throw the switch on track 4?

A. I did not.

Q. Where did you go after you threw the switch on the lead, from the main line to the lead?

A. I rode on the rear footboard somewhere in the vicinity of the yard office; the crew working there threw the switch and signed her back, I dropped back.

Q. Did you see Mr. Koennecke at all before the accident?

A. No, sir.

Q. How long had you been on the footboard before you reached the track at the switch, the lead switch?

A. Can't say.

Q. Didn't you crawl from around that engine on the board and jump off and throw the switch?

A. I might have waited until the engine stopped and got off.

94 Q. As a general thing, as a general rule, don't more people move around the yard at Cayce than between Cayce and Columbia?

A. Yes, I suppose would be more around the track.

Q. And would be at Columbia, around the yard here, than on the line between here and Cayce?

A. I should think would be, yes.

Q. Those laborers here working around the yard and different places, switchmen and conductors only of one crew?

A. They were working near the north end.

Q. They make up trains, through trains, don't they?

A. Yes, sir.

Q. The yard conductor and his switchmen and engineers make up trains to Savannah and to Hamlet?

A. They do.

Q. That is part of their duty?

A. Yes, sir.

Q. That is going on pretty much all the time?

A. About 20 hours out of the day.

Q. That is the place where trains for this vicinity are made up before sending out?

A. Trains for both divisions are made up.

Q. Explain to the jury how trains are made up, what a train consists of; in making up a train what do they do; what does the conductor do, and what does the engineer do, and the switchman, what does he do?

A. Very hard to do that. An engine is a train with or without

cars; might be an engine, or an engine with 100 cars and still be a train; would be a hard question.

Q. Suppose a freight train, to leave there, for, say, Hamlet, tomorrow morning 10 o'clock, how would that train be assembled?

A. If it was a through train, put the cars on one track, couple together, caboose one end, engine the other.

Q. The engineer, the yard conductor and the switchmen would do that assembling?

A. They do all except putting the engine on.

95 Q. That is part of the duty of the yard switchman, yard conductor and engineer?

A. Yes, sir.

Q. Look at this picture; does that to you represent the condition of the ground around the spot where Mr. Koennecke was killed at that time?

A. I could not pretend to say.

Q. How does it compare with your memory?

A. I could not tell whether this is part of the Cayce yard or the Savannah yard.

Q. You remember how the yard looked then?

A. I do not remember that particular spot; I could not pick up any one spot.

Q. Did any part of that yard look like that at that time?

A. I could not say; I could not recognize that picture as being part of the yard.

Q. You could tell whether any part of that yard was rough or covered with sharp clinkers?

A. Were places in it that were rough.

Q. You could tell the jury whether that looks like the place that he was killed?

A. I could not do it with fairness to myself.

CHARLIE BROWN (colored), sworn, says:

Mr. LYLES:

Q. What do you do now?

A. Work in the dam at the government work.

Q. United States Government?

A. Yes, sir.

Q. What were you doing in June last year?

A. I worked in the Cayce yard for the Seaboard.

Q. What were you doing over there?

A. Switching cars.

Q. Do you remember the night Mr. Koennecke was killed?

A. Yes, sir.

Q. What was your job that night?

A. Coupling engine to cars and cutting them off.

96 Q. Were you on the same crew with Mr. Koennecke?

A. Yes, sir.

Q. What was his job?

A. To look out for putting and taking them off and to see they were on the right place.
Q. Who was your conductor?
A. Mr. Barker.
Q. The gentleman who testified this morning?
A. Yes, sir.
Q. Do you remember the time when Mr. Koennecke got killed?
A. Yes, sir.
Q. On what track was your engine at the time he was killed?
A. On 3 track.
Q. What was the number of your engine?
A. No. 419.
Q. Where had you been just before you came back to track 3?
A. Been in 8 track.
Q. Did you hear Mr. Barker tell Mr. Koennecke to go back to track 3?
A. Yes, sir.
Q. You came back to track 3?
A. Yes, sir.
Q. Did you back up in there to couple on to those cars before Mr. Koennecke was killed?
A. Yes, sir.
Q. Now, 423 came in on 4?
A. Yes, sir.
Q. At the time 423 passed you was your train standing still?
A. Yes, sir, standing in the clear track 3; I was standing right by it.
Q. Where were you?
A. Leaning up by the engine, waiting until 423 pulled by.
Q. No. 423 was in your way?
A. Yes, sir.
Q. Was there another engine in track 3 behind your train?
A. Yes, sir; road engine standing in the same track.
Q. Now, at this time you were standing still and 423 passed you going south; was the road engine standing still?
A. Yes, sir.
Q. Was there a headlight on the road engine?
A. Yes, sir.
Q. What kind of headlight?
A. Electric headlight.

97 Q. Now, Charlie, the cars you coupled to, you don't know where they came from?

A. No, sir, the local brought them from the north; where they came from, I don't know.
Q. What local?
A. Toward Hamlet.
Q. You don't know where any of those cars came from?
A. No, sir.
Q. Do you know where they were going?
A. No, sir.

Q. That train brought them in from the north, what was the number of that train?
A. I think 67.
Q. What sort of work was it doing between Hamlet and Cayce, local freight?
A. Yes, sir.

Mr. TOMPKINS: Do not lead.
The COURT: Do not lead.

Mr. LYLES: Before 423 got in there had Mr. Koennecke come back from 8?
A. Yes, sir; he came across to 3 from 8. I got on that engine, backed in 3.
Q. You got in there, where was Mr. Koennecke?
A. Standing at the lower end of the cars.
Q. Where was he standing with reference to track 3 and 4?
A. Between 3 and 4, a little closer to No. 4 than 3.
Q. Was he standing there when 423 pulled around?
A. The last I saw of him he was standing in the clear.
Q. Do you know where he was first struck by the train?
A. Yes, sir; I went to the place.
Q. Was that the same place he was you last saw him?
A. Coming toward the engine from where I saw him, to where he got killed.
Q. What was Mr. Koennecke doing?
A. He was looking at the cars.
Q. What cars?
A. The cars we had coupled to.
Q. That engine 423 coming in, was there a headlight on the back of it?
A. Yes, sir; I looked at it.
Q. Was it burning?
A. Yes, sir, it was burning; that is the only way I could tell.
Q. That headlight from the engine, from the road engine down south, was that shining toward where you were?
98 A. Yes, sir; that was an electric headlight, could see right good.
Q. How long had you worked there?
A. I got there first of January.
Q. Had you been working on the same crew with Mr. Koennecke?
A. Yes, sir; worked with him every night.
Q. What did you do, switch along these tracks all night?
A. Yes, sir; me and him switched.
Q. With reference to the condition of the walkway, anything wrong with that space in there between 3 and 4?
A. Along there pretty good, places along where he had been that night; didn't bother me along there; I didn't have any trouble there.
Q. Were the yards there in the same shape when you all first came over in January?
A. Looked like better shape.

Q. How many switch tracks over there?
A. From one to twelve.
Q. Every night switching,—did you go in all those tracks?
A. Pretty much every night.
Q. Did Mr. Koennecke have to walk through those tracks to attend to his duty?
A. Yes, sir; he can walk around, and ride some.
Q. Was a good deal of switching made in that yard?
A. I got there, found them switching over there.
Q. How many switching engines are moving around there?
A. One working there, and one transfer engine working backward and forward.
Q. Were trains frequently coming in that yard at Cayce?

Mr. COBB: We object; leading.

Mr. LYLES: The question may have been leading, I will change it. State whether or not trains were frequently coming into that yard?

Mr. COBB: That is leading also. I submit you can preface the question with the phrase, state whether or not, and still it may be leading.

99 Mr. LYLES: Charlie, did you see Mr. Koennecke when he got hit?
A. No, sir.
Q. Do you know how it happened?
A. From where he was standing——
Q. Don't tell except what you know. Did you see it?
A. No, sir.
Q. You don't know how it happened?
A. No, sir.
Q. Is there any rule requiring a man to be on the rear of a switch engine in the yard when moving?
A. Not as I know, not the yard part.

Mr. TOMPKINS: We object.

The COURT: He says he does not know.

Mr. LYLES: Ever have a man on the rear of a switch engine in the yard?
A. Not when switching.

Cross-examination by Mr. COBB:

Q. You work for the government now?
A. Yes, sir.
Q. Got a job with Uncle Sam?
A. Yes, sir.
Q. What kind of work do you do?
A. Putting a dam in across the river.
Q. Quit railroading and went to dam building?
A. Yes, sir.
Q. You had to quit the Seaboard?
A. Business got so dull.

Q. When did you quit?
A. November.
Q. You get more pay working for the government?
A. No, sir.
Q. You were on Mr. Koennecke's crew?
A. Yes, sir.
Q. Worked in the night time?
A. Yes, sir.
Q. That night you had gone to track 8 with your engineer?
A. Came from track 8.
Q. On track 3,—to track 8 and came back?
A. Yes, sir.
Q. How did you get there?
A. Went from track 3, and went to 8 and came back to 3.
100 Q. You rode there?
A. Yes, sir.
Q. You would not walk the cars?
A. I was due to follow the engine; I rode pretty much all the time.
Q. Rode on the front?
A. Yes, sir.
Q. That is when you were going to the yard. You said you rode on the front; do you mean that?
A. Yes, sir.
Q. You rode on the front?
A. Yes, sir.
Q. You are a man to stick to your word?
A. Yes, sir.
Q. You went from 3 to 8, stayed there awhile, and your conductor, Mr. Barker, ordered you all back to track 3?
A. Yes, sir.
Q. Mr. Koennecke crossed the tracks between 8 and 3, going in that direction?
A. Yes, sir.
Q. Then you went down with Mr. Barker?
A. No, sir.
Q. Who was the engineer?
A. Mr. Beecher.
Q. Mr. Beecher had to come back down toward the office to get back in 3?
A. He pulled down to the clear of lead 3 and 4.
Q. You were with him?
A. Yes, sir.
Q. Did you see Mr. Koennecke all that time?
A. No, sir.
Q. You saw him most of the time?
A. Yes, sir.
Q. You kept your eyes on him?
A. Yes, sir.
Q. It was your duty to keep your eyes on Mr. Koennecke?
A. Yes, sir.

Q. They employed you to look at Mr. Koennecke?
A. Yes, sir.
Q. That was your job?
A. Yes, sir.
Q. To look at Mr. Koennecke?
A. Yes, sir.
Q. You were performing your duty all right?
A. Yes, sir.
Q. You could see him 15 car-lengths?
A. Yes, sir.
Q. And you were pretty sleepy?
A. No, sir.
Q. You had a drink that night?
A. No, sir.
Q. You ever drink anything?
A. No, sir.
101 Q. You want one?
A. No, sir; I ain't particular about one now.
Q. You went down on No. 8 with Mr. Beecher; you saw 423 come in?
A. Until I came in 3 track.
Q. Then you saw 423 come in?
A. Yes, sir.
Q. Had a big glaring headlight?
A. Pretty good headlight.
Q. You never took your eyes off Mr. Koennecke?
A. As long as I worked I looked at Mr. Koennecke; when I quit work I ain't looking at him then.
Q. You saw the car as it backed in there, the engine backing in?
A. Yes, sir.
Q. It had a light on the front and rear?
A. Yes, sir.
Q. Light burning both ways?
A. Yes, sir.
Q. Things were mighty bright around there?
A. Looked right good.
Q. Smooth and level as the floor?
A. No.
Q. Almost so?
A. No, sir; lacked a long ways of being level as the floor.
Q. What kept it from being level?
A. Can't get it in, crossties, cinders and such is why.
Q. You cannot get them level?
A. No, sir.
Q. Where the flatcar dumps them off, they roll off in ridges?
A. Sometimes.
Q. Do most of the time?
A. Yes, sir, sometimes.
Q. They fall between the tracks?
A. Yes, sir.
Q. Wasn't quite as level as the floor?

A. No, sir.
Q. You saw 423 going back in there about two miles an hour?
A. About four or five miles an hour.
Q. Do you think they were going that fast?
A. Yes, sir.
Q. About two miles?
A. About five miles an hour.
Q. It backed in there; that time you took your eyes off Mr. Koennecke?
A. Yes, sir; I was sitting down side of the engine.
102 Q. Resting?
A. Yes, sir.
Q. You took your eyes off before the car hit him?
A. Yes, sir.

Mr. W. S. BENTON, recalled:

Mr. LYLES:

Q. You stated as your engine went from the lead into 4, your fireman, Gibson, was down firing?
A. Yes, sir.
Q. In which direction were you looking as you moved into that track before reaching the place Mr. Koennecke was struck?
A. The way I was going, backwards.
Q. Could you see a man on the track?
A. Yes, sir, I could have if there had been one there.
Q. Looking back from the tender, how near does a man have to be, how near the tender does a man have to be to cut off your sight?
A. He would have to be within less than a car length.
Q. How about a man on the opposite side of the engine from you, track 3, started to walk back in front of it, could you see him from that position, if he was near the engine?
A. Yes, sir; if he was near the engine.
Q. The man coming from 3?
A. I could see him in a car length.
Q. Close?
A. About 35 feet.
Q. Suppose he stepped right in behind the engine could you see him?
A. No, sir.
Q. You were looking in the direction in which you were going?
A. Yes, sir.

R. H. GARRETT (white), sworn, says:

Mr. LYLES:

Q. Are you in the employ of the Seaboard?
A. Yes, sir.
Q. In what position?
A. Assistant or resident engineer.
103 Q. Where are you now?
A. Florida.

Q. Do you remember when the yard at Cayce was constructed?
A. Yes, sir.
Q. Did you have anything to do with constructing these different yards?
A. I had charge December 11, '11.
Q. When were these yards put in use?
A. January 5, 1912.
Q. Have you the blue print showing the Cayce yards?
A. You have one in your hand on which I made all the measurements showing the completed yard.
Q. Do you know this blue print is correct?
A. Yes, sir.
Q. Have you checked over the measurements on it?
A. Yes, sir.
Q. Come down to the jury and explain it. In the first place I offer this in evidence.

(The witness went down before the jury and explained it to them.) (Pointed out where the main line ran through the yard; where the lead track leaves the main line; how the engine would came in to get on the tracks; the yardmaster's office; the lead track.)
[It is agreed that defendant may furnish copies of this blue print to the members of the Supreme Court.]

Q. Why do they call that the lead track?
A. Leads to all these others.
Q. Which way are those tracks numbered?
A. From the main line.
Q. Point out tracks 3 and 4?
(Witness did so.)
Q. What is the distance of the yardmaster's office to this switch you speak of as the north switch?
A. 9.20, about 540 feet; distance yardmaster's office to 4 switch, 160 feet. To be exact, this 540 feet, changed to 552 7-10. This is 168 feet.
Q. This yard has been in use since when?
A. Turned over January, '12.
Q. Turned over in January, 1912, what do you mean by turned over?
A. The other party took charge.
104 Q. When did you leave there?
A. I had charge of portion of the work until September 14, 1913.
Q. Well, at that time, was the yard regularly in use?
A. Yes, sir.
Q. As a switch yard?
A. Been in use over a year,—or nearly a year.
Q. Was a good deal of switching done in that yard?
A. Quite a good deal.
Q. Regular thing for an engine and cars to be in motion over there?

A. Yes, sir. I gave the wrong date, January 5, '13, instead of '12, the date turned over.

Q. Had been in use before that time?

A. Yes, sir; began using it about the middle of the summer, '12.

Q. When did you leave there?

A. September, 1913.

Q. What was the condition of these walkways and tracks with reference to the evenness of the ground between 3 and 4 when you left there?

Mr. TOMPKINS: We object; better confine it to that time with this engine and cars, if he knows.

Mr. LYLES: Were you there June, 1913?

A. Yes, sir.

Q. At the time Mr. Koennecke was killed?

A. Yes, sir.

Q. What was the condition of tracks and walkways at that time?

A. I considered them in——

Mr. COBB: Not what he considered.

The COURT: Just state how they were.

WITNESS: Very good condition.

Q. As to cinders and clinkers along the walkways, and evenness of the ground, tell the jury about it?

A. No holes, and no high bumps; had been a few cinders placed around the yardmaster's office and along the ladder lead, between the tracks, between the crossties, they had been levelled down, raked down and the crust broken up, only small cinders on top.

Q. What is the character of the soil in that place?

A. Clay; we hauled sand in there for ballast under the track, except along the ladder, we used cinders to start with on clay foundation.

Q. What was the character of those electric lights in the yard?

A. 500, representing about 556 candle power.

Q. Where was the light you speak of located?

A. Near the top of the sand house on bracket.

Q. With reference to the sand house, is that toward the main line?

A. No, sir; that is over the other way.

Q. How far from the place where that light was located to the place where Mr. Koennecke was supposed to be killed?

A. About 140 or 150 feet.

Q. Were any other lights in there?

A. Except small lights on the coal chute.

Q. No other stationary light?

A. That's right, in that immediate vicinity.

Q. Have you had much experience in the construction of yards and such things?

A. I have been doing that work since '03.

Q. Have you had experience in constructing and in the operation of other yards as well as this one?

A. Yes, sir.

Q. What is the practice with reference to lights in switch yards, are they considered of advantage or disadvantage?

A. Quite often figured on; the transportation department opposed them seriously on account of the fact that they deceive a man's eyes, when moving toward them apt to confuse a man, the disadvantage is more than the advantage gained.

Q. Tell briefly your experience as an engineer in railroad work; how many years have you been in it?

A. Eight or nine years.

Q. Are you a member of the Association of Engineers?

A. Yes, sir.

Q. That requires how many years of service?

A. Six to eight years actual experience.

106 Cross-examination by Mr. TOMPKINS:

Q. I am going to ask a few questions. Mr. Koennecke testified he took these photographs of the part of the yard which is in question, where his father was killed; I want to know does that correspond with your memory as to how that place looked at that time?

A. No, sir, it does not; these may or may not have been in that yard. I could not identify it; my recollection is it never looked like that.

Q. How long since you have been connected with the yard?

A. I left there September, last year; I was back in February on a little business.

Q. The use of clinkers——

A. The idea of clinkers, is good drainage.

Q. You think employees ought to walk sharp clinkers down?

A. No, sir; they are raked down.

Q. After they are raked down they are extremely rough and sharp as a general rule?

A. No, sir, not as a general rule.

Q. In this photograph,—I do not reckon these are clinkers?

A. I don't know; looks like a blurred photograph to me.

Q. How about this one here?

A. Not clinkers; rocks there. This is a small crushed rock, and they may or may not be clinkers.

Q. Don't look like clinkers to you?

A. I won't say what they are, I can't tell.

Q. Did you make an examination of this ground right after the accident?

A. No, sir.

Q. You were working there at that time?

A. I was working there and in Columbia together; I had charge of the work preliminarily in Columbia.

Q. How long since you inspected the spot?

A. Last week or this week.

107 Q. You think there has been any improvement?

A. No material improvement.

Q. A witness said it was worse than when he started there, then it was worse when Mr. Koennecke got killed?

A. Would be new.
Q. Newer than then?
A. Yes.
Q. Time will gradually level all these clinkers down?
A. It may level all the roughness. Main street here is rough at times.
Q. I am talking about clinkers; Main street is a different proposition?
A. You asked if time didn't improve it. Time might improve it or wear it out. I did not see any material improvement.
Q. Then there must be a mistake about it there?
—. ——.
Q. You think those clinkers as originally put down were good enough for a railroad yard?
A. Best thing for the purpose.
Q. Your duties are mostly in the office?
A. No, sir; mostly in the field. I had about a year and a half in the office out of nine years' actual experience.
Q. Electric lights for yards; give your opinion about them?
A. I would not like to pass an opinion, except I do not think they are bad when low; if possible to get them high enough, and get them so the supports wouldn't be in the way, would be a good thing; if you put an electric light on a pole in between the track more danger from a man hitting the pole than you will get benefit from the light that might be derived from one on that pole.

Mr. LYLES: I do not know whether I am through or not. I would hate to be required to close my case. I know I have very little more, but whether I have anything more I do not feel that I can decide at this moment. The case has been changed entirely since I prepared it, I do not know where I stand. I ask your Honor to adjourn.

The COURT: Seems to me the matter is very plain; I do
108 not see any complication about it. We did switch off a little on the question of punitive damages, that is out of it, that is entirely eliminated. Whether there was negligence, that stands as it would stand before. Now, on the question of contributory negligence; that does not defeat recovery, if this man was engaged in interstate business, it goes to the question of reduction of damages. And on the question of the form of the verdict, how they will find; they can only find actual damages, what the actual pecuniary loss would be. I do not know that is a very material change. I understand the whole thing. The only matter that puzzles me is whether or not, if the facts were disputed in the case, whether the party was engaged at the time in interstate or intrastate business. It would put me in the position of having to charge the law in both aspects, and leave it to the jury to say which one applied, under the circumstances. I have never seen a case like this; I do not think any such case ever arose; do not remember such case being before the Supreme Court of the United States. I do know, however, what the Supreme Court of the United States held in the case I have mentioned.

Mr. LYLES: I have some authorities.

The COURT: I will be glad to see the authorities.
Mr. LYLES: I would like to have the opportunity to consider the question whether I have any more testimony.
The COURT: We will adjourn until tomorrow, 9:30.

A. E. ROGERS (white), sworn, says:

Mr. LYLES:

Q. Be careful and speak so these gentlemen can hear you. Are you an engineer in the employ of the Seaboard?
A. Yes, sir.
Q. Were you so employed June 13, '13?
A. Yes, sir.
109 Q. Did you go into the Cayce yard on the night Mr. Koennecke came to his death there?
A. Yes, sir.
Q. On what train did you come in?
A. Extra 77.
Q. From which direction?
A. From the south.
Q. When you came into the yards, where did you stop your engine?
A. Somewhere about 28 car-lengths from the north switch—from the south switch, 3 track.
Q. You went in the 3rd track, were any cars on there ahead of you?
A. Yes, sir.
Q. That is the reason you stopped your engine?
A. Yes, sir.
Q. You know when 423—You came in ahead?
A. Yes, sir.
Q. Was there any engine on the rear cars in front of you?
A. No engine I could see.
Q. No. 423 came in from Columbia and went by you?
A. Yes, sir.
Q. At the time,—before 423 came in, and came by you, was the engine headed or backing?
A. It was backing.
Q. Any cars in front of the engine?
A. No, sir.
Q. Was the headlight on the rear of that engine burning?
A. It was.
Q. Was it in good shape?
A. Yes, sir; I judge it was.
Q. Did you have a headlight on your train?
A. Yes, sir.
Q. What was the character of your light?
A. Electric light.
Q. Is that a powerful light?
A. Yes, sir; good light.

Q. Those electric lights are used on all road engines of the Seaboard?
A. They are at present.
Q. Were many in use on the engines of the Seaboard at that time?
A. I think at that time they were all equipped with electric lights.
Q. They had been using them at that time for considerable time?
A. Yes, sir.
Q. Engines that passed along the line of the Seaboard, road engines carrying trains passing in and out of Cayce yard?
A. Yes, sir.
Q. That is where the trains are broken up?
A. Yes, sir.
Q. A number of trains at that time came into and went out of the yard?
A. Yes, sir.
Q. When 423 passed up along track 4 by the side of you, and passed by those cars in front of you, was your engine in motion or stationary?
A. Standing.
Q. Was the train in front of you in motion or standing?
A. Standing.
Q. Suppose Mr. Koennecke was at the time he came to his death standing up between 3 and 4 by the side of those cars in front of you, was your headlight shining in that direction?
A. It was.

Cross-examination by Mr. TOMPKINS:

Q. How far was your engine from the cars on the track in front of you?
A. Three or four car lengths.
Q. That headlight when it leaves your engine is a very small circle of light?
A. About 23-inch reflector.
Q. That headlight grows bigger?
A. Spreads.
Q. The electric light of an engine connected with the running parts of the engine, is run by the power of the engine?
A. Run by steam from the boiler.
Q. Not a matter of great expense to the company?
A. I could not say.
Q. You don't have to buy power to run it with?
A. Coal and water.
Q. Attachment put on your engine?
A. The engine is run to itself—the headlight is—the headlight is an arc light.
Q. On passenger train they have an electric light throughout the entire car running from the engine?
A. No, sir.

Q. Where does that come from?
A. They have their own power; they have a dynamo under the cars run by the wheels.
111 Q. All run by the movement of the train?
A. Yes, sir.
Q. Where was your run from?
A. South Carolina Division between Jacksonville and——
Q. Freight or passenger train?
A. Freight train.
Q. Did your train pass through the Cayce yards, and on which track?
A. I could not tell whether it passed, or whether the cars stayed there, I could not say where the train went after I brought it there, that was an end of my run.
Q. What kind of trade were you hauling?
A. I could not tell where going; I did not know the contents of the train.
Q. Going north, some of it?
A. I presume.
Q. You brought freight from the State of Georgia?
A. No, sir.
Q. Into South Carolina?
A. Yes, sir.
Q. You got to Cayce, who did you turn that train over to?
A. I cut the engine off.
Q. Who took charge of it?
A. I suppose the yard people.
Q. Switched across?
A. That is out of my line of business; that is the conductor's job. My engine, I took care of that.
Q. You saw who took it?
A. No, sir.
Q. Did not see on other occasions?
A. I do not know who takes care of the train, but I suppose it is broke up by the yard crew and switch engine crew.
Q. Who was the yard crew?
A. I don't know.
Q. How long have you been running in there?
A. About five years.
Q. You mean to tell us you have been running in that yard five years bringing your trains, and you don't know who the yard crew is, or was?
A. I mean to say that exactly.
Q. Did you know Mr. Koennecke?
A. No, sir, I did not; not if I were to see him.
Q. You know Mr. Barker?
A. I did not until I saw him on the stand yesterday.
Q. Where would you go when you came in?
112 A. Usually go over and get a bite to eat, and go to bed and sleep until they call me, and get on my train and go again.

I know the yard people like I know you; I know your face and not your name.

Q. When you got ready on your run that night, or the next day when you went out did you make up your own train?

A. No, sir.

Q. Your train would be made up for you and on the track?

A. Yes, sir.

Q. Your engine would be steamed on the track ready for you?

A. Would be put across the turntable.

Q. Who would notify you where your train was that you were to take out?

A. Sometimes the brakeman would come and tell me, sometimes have to go in the yard and ask the switchman or car inspector, can't tell where, couldn't find out and don't know who will tell you where it is.

Q. Some danger sometimes of getting the other fellow's train?

A. I know of such things happening, but I never had that to happen.

Q. The yard conductor ever notify you where your train was, and the number?

A. Supposed to, but don't always.

Q. Were your trains numbered, anything to show they are ready for transportation?

A. No, sir.

Q. They were not?

A. They are not numbered.

Q. No way you could tell which was the train you had to carry out except to go there and find it there?

A. Have somebody to tell you where it is.

Q. Who was the proper person to tell you where your train was?

A. I don't know whether any proper person, or not. If I can see the conductor before I start the engine I say, "Where is the train?"

Q. Yard conductor?

A. My conductor, and if he will say I don't know, I will go to the engine, maybe the brakeman will come to the engine, and I will say, "Where is the train?" He might say, "I don't know, Capt., over there somewhere," and I will go to the other end of the yard, and maybe find the car inspector—he knows where the train is made up for, and if he does not know I ask the switchman or the engine foreman.

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Q. At that time you were running up to Cayce to go back to Savannah?

A. Yes, sir.

Q. You got to Savannah, what did you do with the cars?

A. Put them in the yard track, cut off the engine.

Q. Did you run through or local freight?

A. Through freight.

Q. Do you put off any car boxes from the time you leave until you get to Savannah or until you come to Columbia?

A. Sometimes.

Q. Generally you would not? What do you mean by through freight?

A. I suppose all through cars, but we have junctional points.

Q. From where?

A. From this end to the other end, or Cayce to Savannah, but we have junctional points along the road, supposed to switch off cars.

Q. Where does the Seaboard run from?

A. Has headquarters at the other end. From Richmond to Tampa, Fla.; have extensions.

Q. Go through North Carolina to Hamlet?

A. Virginia, North Carolina, South Carolina, Georgia and Florida; through all these States.

Q. Are they engaged in carrying freight between those States?

A. Yes, sir; I think they did.

Q. Cayce is one of the yards where they make up trains and distribute cars?

A. Make up and break up cars.

Q. These interstate freight trains are taken charge of and made into different trains and go in various directions?

A. Yes, sir.

114 J. C. HUNT, recalled:

Mr. LYLES:

Q. You said yesterday you went and told Mr. Koennecke about this place that was open over at the Seaboard. Tell the jury whether or not you made that visit to Mr. Koennecke and made that statement at the request of any officer of the Seaboard, or in your personal capacity?

Mr. TOMPKINS: We object.

The COURT: I think it competent.

Mr. LYLES: He testified yesterday that he is the man who told Mr. Koennecke of this job. Did he make that statement under request of any officer of the road, or in his individual capacity; did anybody tell him to do it, or did he go of his own accord?

Mr. TOMPKINS: We object; it has nothing to do with this case.

The COURT: It is not entirely irrelevant. May have some relation to the matter. Let him ask the question.

WITNESS: Up to the time—I don't know the date—didn't have night yardmaster——

Mr. TOMPKINS: We object. He is not answering the question. We are entitled to have the questions asked and answered, so we will know when to object.

The COURT: Conceding all that; sometimes a little elasticity has to be given; I do not know what he is going to say.

WITNESS: They established the night yardmaster's position. Mr. Shay suggested to Mr. Thornton to put me on it; right then I told Mr. Thornton I did not want it, and it went off, about two days.

Mr. Thornton insisted I take the job; he suggested if I did not want it he would not keep me longer on it.

Mr. TOMPKINS: We object.

The COURT: It is shorter to let him answer than interrupt him.

115 Mr. LYLES: Why did you go there?

A. To get Mr. Koennecke, or some one; went to get Mr. Koennecke, put him on the job, asked him to take the job, to intercede for the job so I could get off the job.

Q. Did any one send you there?

A. Did not.

H. L. J. BLOOM (white), sworn, says:

Mr. LYLES:

Q. Where do you live?

A. Orangeburg County.

Q. Are you in the employ of the Seaboard?

A. No, sir.

Q. Were you subpœnaed to come here in this case?

A. Yes, sir.

Q. Do you know Mr. Spires?

A. D. A. Spires?

Q. The gentleman sitting here?

A. Yes, sir.

Q. Did you ever miss a mule?

Mr. COBB: We object. If he wants to impeach the reputation of Mr. Spires, must first ask whether he knows it, and whether bad or good. If they want to prove by this witness that he has been convicted of an infamous crime which would disqualify him from testifying, they must bring the record in Court showing he was convicted. If he missed a mule what has that got to do with this case? If he wants to impeach Mr. Spires' reputation for honesty, truth telling, if he wants to do that he must proceed in the regular way.

The COURT: I understand that.

Mr. LYLES: Mr. Spires testified yesterday he never stole this gentleman's mule; I am trying to contradict him.

Mr. COBB: To contradict him on a collateral matter.

The COURT: I do not see what the stealing of a mule has got to do with it.

Mr. LYLES: Do you know Mr. Spires' reputation in the community in which he lived?

A. Yes, sir.

Mr. COBB: Reputation for what?

Mr. LYLES: Honesty, truth and veracity.

116 Mr. COBB: First find out if he knows his general reputation; if he knows his reputation for truth and veracity.

Mr. LYLES: That is the way I was going at it. Do you know Mr. Spires' general reputation in the community in which he lives?

A. Yes, sir.

Q. Do you know his reputation for truth and veracity?
A. Yes, sir.
Q. Good or bad?
A. Bad.
Q. Would you believe him on his oath?
A. I would not.

Cross-examination by Mr. COBB:

Q. How did you get in this case?
A. I was subpœnaed here.
Q. What is your reputation down there?
A. You will have to prove that by others.
Q. You left your home the same as this man?
A. I am subpœnaed to be here.
Q. There is a pass attached to the subpœna?
A. Yes, sir.
Q. You expect to get pay for it?
A. I don't expect to lose my time.
Q. How long has Mr. Spires been away from down there?
A. He has been from there several different times; it has been two years since he lived there.
Q. You don't know since the railroad had him in their employ?
A. I heard so.
Q. Was he staying down there two years ago?
A. I think it was two years ago he lived there.
Q. What did he do?
A. Farm.
Q. Did he live there up to two years ago all the time?
A. He was raised in the community and lived at different places.
Q. Did he live there up to two years ago?
A. No, sir, not at Nestor.
117 Q. Where had he been?
A. He moved about to different places. I have known him and his father.
Q. Have you been keeping your eye on him up to two years ago?
A. No, sir.
Q. How do you know about his reputation?
A. I am speaking of general reputation.
Q. Has he not been off doing railroad work?
A. He has been away part of the time. But I have known of him ever since he was a boy.
Q. What do you do?
A. I farm.
Q. Nothing else?
A. I am a cotton buyer.
Q. You are a horse trader?
A. I have dealt in stock, yes, sir.

C. D. THORNTON (white), sworn, says:

Mr. LYLES:

Q. What is your position with the Seaboard?
A. Train master.
Q. On which division?
A. North Carolina.
Q. In what capacity? Have you jurisdiction over the yards at Cayce?
A. I have.
Q. Did you employ Mr. Koennecke when he first came to work with the Seaboard?
A. I did.
Q. Is this Mr. Koennecke's signature?
A. Yes, sir.

The defendant then introduced the application signed by J. T. Koennecke, and dated May 23, 1913, entitled: "Application for Situation on the Seaboard Air Line Railway for Position as Yard Foreman," the relevant portions of which are as follows:

"1. Name in full—J. T. Koennecke.
"2. Age—52.
"3. Nationality—American.
"4. Where born—Charleston, S. C.
"5. Married or single—Married.
118 "6. Weight—134.
"6½. Height—5.9.
"7. Complexion—White.
"8. Color of hair—Dark.
"12. By whom are you employed at present?—S. A. L. R. R. Where? Columbia, S. C. In what capacity are you employed? Yard foreman and switchman.
"13. What was your last employment? Yard Foreman.
"14. By whom employed? Southern R. R.
"15. When did your last employment terminate? Dec. 15, 1913.
"16. What was the cause of its termination? Violating Rule G.
"17. How have you been occupied since your last employment terminated? With S. A. L. R. R.
"18. State what railroad experience you have had, giving names of roads, in what capacity employed, length of service on each road. If you have not previously been employed by a railroad company, state by whom and when and where you were employed. (Applicant must here give his history for last five years, beginning with his position of five years ago and giving each year in regular order down to date.)

	From—				Under whom.					
	Mo.	Day.	Year.	Occupation.	Name.	Title	What road or firm.	Location.		
a	July	1,	1908,	Yard Foreman,	H. A. Williams,	Supt.,	Southern Ry.,	Columbia, S.C.		
b	"	"	1909.	"	"	"	"	"	"	"
c	"	"	1910.	"	"	"	"	"	"	"
d	"	"	1911,	"	"	"	"	"	"	"
e	"	"	1912,	"	J. W. Wassum	"	"	"	"	"

"19. State fully the cause of your leaving each of the above positions (answer by number or letter)—Dismissed from service, Dec. 15, violating Rule G, Sou. R. R.

"20. State whether or not you are in any way unsound or deformed in body or limb, or have lost any part of your limbs, and if so, describe the same. State whether or not you were ever
119 injured in any accident; and if so, give date, location, name of road on which occurred, nature and extent of injury and whether entirely recovered; also, whether settlement has ever been made and the consideration for same—Was scalded on right leg failing in hot water hole in shop yd. Sou. R. R. Time allowed for same.

"23. Have you ever had any serious illness or surgical operation? No.

"25. Have you ever had rheumatism, piles or venereal disease of any kind? No.

"26. Have you ever had fracture or injury of any kind to any of your bones or joints? No.

"27. Are you ruptured? No.

"29. Have you ever been discharged or suspended from any situation? If so, state particulars, when and where? Dismissed from Sou. R. R., Violating Rule G.

"30. Have you ever been in the employ of this Company? If so, state when, in what capacity, on what division, and cause of leaving. Since Jany. 16, 1913. N. yd. Master, Foreman and Switchman.

"31. My hearing is good and eyesight O. K. and I am able to distinguish colors.

"32. Do you use intoxicating liquors, and if so, to what extent? Not often.

"33. Do you understand that drinking on duty or before going on duty, or frequenting places where intoxicating liquors are sold, is sufficient cause for dismissal from the service? Yes.

"34. Do you understand that this Company does not block all frogs, guard-rails or switches, and that you must govern yourself accordingly? Yes.

"35. Do you understand that a failure to comply with the rules and regulations of this Company is a sufficient cause for dismissal from the service? Yes.

120 "36. Do you understand that every employe of this Company whose duties are in any way prescribed by the rules must always have a copy of the rules at hand when on duty, and must be conversant with every rule, and that you must render all the assistance in your power in carrying them out, and immediately report any infringement of them to the head of your department, and do you agree that such rules, including any changes therein or additions thereto from time to time, shall be a part of your contract of employment? Yes.

"37. If employed, will you faithfully discharge the duties assigned to you to the best interest of the Company? Yes.

"38. Do you understand that at some points on this line there are platforms, sheds, roofs, water tank frames, telegraph poles, bridges, scales, cars and other side obstructions, and trolley wires

of street railways, which may be dangerous, and that you must inform yourself as to the location of such obstructions and use due care to avoid injury thereby? Yes.

"40. Do you understand that all employes are expected to protect themselves from personal injury by avoiding risks, and that those who may receive injuries on account of taking risks will have no claim upon the Railway Company? Yes.

"42. Do you understand that the Company does not have all its main tracks and side tracks ballasted or surfaced, and that the tracks are liable to have slivers on the rail; and that there are cattle-guards and uncovered drains on the main tracks and side tracks, of all of which you accept notice, and agree to particularly advise yourself thereof? Yes.

"43. Do you understand that no officer or employe of this Company is authorized to request or require you to use defective tracks, cars, machinery or appliances of any kind, except at your own risk of injury therefrom? Yes.

121 "I hereby certify on my honor that the answers to the above questions are correct and true.

(Signed) "J. T. KOENNECKE, *Applicant.*"

Mr. LYLES: What was the time, at what time did Mr. Koennecke first come into the employment of the Seaboard?

A. About the middle of January.

Q. Of which year?

A. 1913.

Q. Now, in what capacity was he first employed?

A. Night yardmaster.

Q. At Cayce?

A. Yes, sir.

Q. How long did he hold that particular position, approximately, if you don't know accurately?

A. About two months.

Q. He was then changed to what position?

A. Yard conductor and switchman.

Q. Now, why was that change made; why was he changed from night yardmaster to yard conductor and switchman?

A. I was not satisfied with the work he was doing at night.

Q. State whether or not during the entire time Mr. Koennecke was employed at the Cayce yards as night yardmaster or yard conductor and switchman his duties required him to be out among the tracks and in the yard?

A. They did.

Q. Tell the jury what his duties were in both of those capacities?

A. His duties as night yardmaster was to keep the men posted as to the time trains would arrive, see after the making up of trains, direct movement of yard conductors, check up tonnage on the yard, see if — have sufficient tonnage to run trains; to properly overlook those duties.

Q. Was Mr. Koennecke himself required in that capacity to go in and out among the tracks in the yards?

A. He was.

Q. State whether he had to do considerable walking in and around the yard?

A. He did. He had to check all tracks. His duties as
122 yard conductor are in a large measure assigned him by the night yardmaster when the trains come in. They give him a switch list, and he switches cars accordingly to their destination on switch list.

Q. Does he ever go around with the engine?

A. He goes around good deal with the engine; he does not follow the engine in every move.

Q. What were his duties as switchman?

A. His duties as switchman, was following the engine, stay pretty close to the engine, couple, uncouple freight cars, etc., would go to the rear, cut cars, apply brakes, etc.

Q. Those duties required him frequently to go in and out among brakes in the Cayce yard?

A. It would.

Q. Would it take him all over the yard every night?

A. Practically all over the yard every night.

Q. Sometimes would have to go several times?

A. Yes, he would have to go over the yard every time of switching a train.

Q. How long did he work?

A. Ten hours straight, frequently 12 hours, if necessary.

Q. Ten hours at night, and frequently 12?

A. Yes, sir.

Q. What was the pay of a switchman, how much pay would he get?

A. As yard conductor at night he would get $3.70 a day; conductor got $3.50, is my recollection; as switchman at night he would get $3.20 a night.

Q. What was that for; was that for 10 hours?

A. For 10 hours.

Q. If he worked 12 hours would he get over time?

A. Yes, sir; got 32 cents an hour over time.

Q. That would make $3.94 at night if he worked 12 hours?

A. I haven't counted it. As switchman he got 32 cents an hour over time at night.

Q. Making it $3.84 if he worked over time?

A. Yes; sometimes make 11 hours, sometimes 12 hours. Sometimes trains come there when you can't go to year meal; if
123 they don't get the meal hour when due, you have to pay them for it.

Q. Do they ever work over 12 hours?

A. My recollection is the switch engine- at Cayce have been double crewed all the time, day and night crew, wouldn't be apt to work over 12 hours.

Q. During the 10 or 12 hours he was on duty as a member of the

switch crew, as yard conductor, or switchman, would they be constantly moving in and around the yard?

A. Would be, that was their duty.

Q. In June, '13, how many engines of the Seaboard had electric headlights?

A. Practically all the road engines.

Q. Had the road engines been equipped with electric headlights some time before then?

A. They had.

Q. In the Cayce yard, and all road trains of the Seaboard coming in there, those from Savannah, Hamlet and intermediate points?

A. Yes, sir.

Q. How many trains at that time, on an average, would you say, come into Cayce at night?

A. Three freight trains, anyhow. I think would average three freight trains.

Q. How many passenger trains?

A. Passenger trains would come up the main line, they wouldn't come in the yard.

Q. How many passenger trains pass on that main line?

A. Only be one, unless some were late.

Q. In January wouldn't the morning train come through while dark?

A. Yes, the limited train would come through there.

Q. Also No. 4?

A. No 4 was the train I was——

Q. No. 43—How about 98? Look at the time table?

A. I was thinking coming south; I was only thinking one way.

Q. Would be several passenger and freight trains?

A. Yes, sir.

Q. At that time any local freight train running into Cayce yard?

A. Yes, sir.

124 Q. Where from?

A. One local freight train starts at Hamlet, and the other one from the south, my recollection is starts at Denmark.

Q. That is in South Carolina?

A. Yes, sir.

Q. That local train running between Hamlet and Cayce went under 67 and 68?

A. Yes, sir.

Q. In coming from Hamlet would that train make all local stops?

A. Yes, sir; Hamlet to Cayce, probably wouldn't run to a single station, from Hamlet to a station, wouldn't be a station but what would have something to do; might not set off cars, but would have check work to do.

Q. State whether or not it would pick up and take off cars to those points as the work demanded?

A. Yes, sir.

Q. Was an infallible rule that 67 when it came in Cayce would always bring in cars from Hamlet or from points beyond?

A. No, sir, not necessarily. Local freight is not run to handle through stuff, supposed to handle short hauls.

Q. Sometimes that train would come in without stuff from North Carolina at all?

A. Yes, sir.

Q. Without stuff going through to Savannah or through the State?

A. Yes, sir.

Q. The only way to tell whether it had stuff coming from North Carolina, or going to Georgia, or had cars going from North Carolina, or Georgia, would be to find out whether that particular train had them?

A. Yes, sir.

Q. Before Mr. Koennecke came to his death were you ever in the yard with him at Cayce in the performance of his duty?

A. Yes, sir; frequently.

Q. Did you ever walk around the yards with him?

A. I have.

Q. State whether or not any change in the condition of the walkways on the tracks in the Cayce yard, or the particular walkway between 3 and 4 during that time?

A. None that I know of.

Q. Did Mr. Koennecke at any time in those trips while
125 with you make complaint to you of the condition of the yard, or walkways, tracks?

A. He did not.

Q. Did he ever make objection to working there?

A. No, sir.

Q. Did he ever state to you he considered the walkways, or tracks, or lights in the yard in the least dangerous?

A. He did not.

Q. You would have been the proper person for him to complain to?

Mr. TOMPKINS: Do not lead him.

Mr. LYLES: You employed him?

A. Yes, sir.

Q. Something has been said with reference to the work at the time he entered your employ; state whether or not Mr. Koennecke was an experienced switchman?

A. He was.

Q. Are the conditions of the Southern Railway where he had worked practically the same as at Cayce?

A. The Southern rails are practically the same as the Seaboard. I don't know the condition of the yard.

Q. All the railroads in yards carry practically the same danger to employees?

A. Yes, sir.

Q. With reference to the application of Rule U in the time table. Please give us definition of the word "yard" contained in the Rule Book; definition of what "yard" is. Under the title "yard," read that.

Witness reads: "Yard.—A system of tracks within defined limits provided for the making up of trains, storing of cars and other purposes, over which movements not authorized by time table, or by train order, may be made, subject to prescribed signals and regulations."

Q. Now, was the Cayce yard, where Mr. Koennecke was employed; was that yard within that definition?

A. It was.

Q. At the time he was killed?

A. I- was.

Q. State whether or not Cayce yards, with reference to the jurisdiction of the division, were separate from the Seaboard
126 main line that passed along by the yards?

A. They were separate from the main line.

Q. Under whose jurisdiction were the Cayce yards?

A. Under my jurisdiction.

Q. Under what division?

A. North Carolina Division.

Q. What is the next definition below the one you read, definition of yard engine?

A. "An engine assigned to yard service and working within yard limits."

Q. Explain to the jury whether any yards at the Columbia end of that trestle is what they call "interchange yard"?

A. Call that joint yard; that is the yard where we make delivery and receive cars from the Coast Line and Southern roads.

Q. Has the Seaboard any other yard on this side of the river besides the "interchange yard"?

A. It has a siding, track yards.

Q. An engine going between those points interchange and siding track and Cayce yard on the other side of the river would pass part way along the main line?

A. It would.

Q. Are you familiar with Rule U in the time table?

A. I am.

Q. Suppose that was a switch engine going from one of those yards to the other, at what time during that journey, if any, would it be subject to the provision of Rule U?

Mr. TOMPKINS: We object.

The COURT: He is not trying to contradict.

Mr. LYLES: Explain the application.

The COURT: He cannot give his opinion, but whether he knows of his own knowledge, whether that rule is applicable or not.

Mr. LYLES: Did you make it, this time table?

A. Yes, sir.

Q. Have you my question about the engine, and Rule?

A. Yes. The rule is U. Would apply to the switch engine while it was on the main line, because a switch engine is governed
127 by the time table; after it leaves the main line Rule U would not apply.

Q. Explain to the jury the construction of a switch engine with reference to the tender and headlight?

A. A switch engine is so constructed, with a space on each end and a slanting tender so that the engineer can get a view regardless of which way he is moving, so that the movements can be made within the yard without any one riding either end or without a protection in front—as they have on road engines.

Q. Do they have their lights?

A. They have headlights on both ends of a switch engine.

Q. Do you know whether 423 was a switch engine such as you have described?

A. It is and was at the time.

Q. Answer this question, at the time Mr. Koennecke was killed and during the time he was in the service had it been customary, or the practice of the Seaboard in running switch engines in the yard service to have a man on the back of them when they were backing, in front when they were backing?

A. No, sir.

Q. To look out for employees in the yard?

A. Not customary then or now.

Q. Has it ever been?

A. No, sir; not to my knowledge.

Q. You said the time Mr. Koennecke was killed, June, '13, was local freight that regularly came in the yard from Denmark?

A. That is my recollection.

Q. That was strictly local freight?

A. That is my understanding.

Q. You know where Denmark is?

A. Yes, sir.

Q. That is in this State?

A. Yes, sir; South Carolina.

Q. You know where Cayce is?

A. Yes, sir.

Q. That train moved between those points?

A. Yes, sir.

128 Cross-examination by Mr. TOMPKINS:

Q. Suppose that train were to find at the station of Styx a carload of lumber consigned to Richmond, Va., would it take it up?

A. It would.

Q. Local freights as well as through freight handle freight consigned out of the State?

A. Yes, sir.

Q. Handle both interstate and intrastate freight?

A. Yes, sir.

Q. And all the freight trains that pass over this line made up in Cayce yard were passed through; trains made up there and broken up?

A. Yes, sir.

Q. Hamlet is in North Carolina?

A. Yes, sir.

Q. And if any freight was sent from Hamlet, N. C., to Columbia, S. C., or anywhere between here, that train would handle that?

A. If it had it started it would bring it through.

Q. The engine and tender made up in Hamlet?

A. Yes, sir.

Q. That is if the train was made up. Now, the major greater part of the freight which is handled by your road in Cayce yard is interstate freight?

A. Yes, majority interstate.

Q. The yard conductor and his switchman and engineer, they have the duty of breaking up and making up freight trains?

A. Yes, sir.

Q. Both interstate and intrastate?

A. Yes, sir.

Q. And Mr. Koennecke was a member of such crew?

A. Yes, sir.

Q. And employed for that work at the time he was unfortunately killed?

A. Yes, sir.

Q. Who was over him in that yard direct? You testified he was under you, but who was the boss?

A. Dorn.

Q. How about Warmack?

A. At night, yes, sir.

Q. He was a very good office employee in the yard?

A. Warmack wouldn't be apt to go out and give Mr.
129 Koennecke any instruction, but would give it to his conductor and the conductor would hand it to him.

Q. Two men over him, between you and him?

A. Yes, sir.

Q. What yards have you to look after besides Cayce?

A. At that time I had Raleigh and Hamlet and Cayce.

Q. How about Columbia?

A. We consider that is all one yard; I had Columbia also,—but Cayce yard. This siding track yard is only used principally for storing stuff and storing cars.

Q. Mr. Koennecke was paid as yardmaster and switchman, wasn't he?

A. That depends on what job he was working; he was paid for what job he was working.

Q. Wasn't the last check issued to him as yardmaster and switchman?

A. I don't know; if it did it will show; get the check, how many days he made in that capacity.

Mr. TOMPKINS: Have you that check in Court, Mr. Lyles?

Mr. LYLES: I think so. (Handed to Mr. Tompkins.)

Mr. TOMPKINS: Refresh your mind from that check?

A. What do you want me to do?

Q. Was he paid as conductor?

A. That states on it, conductor.

Q. Look at that one, refresh your mind from that; wasn't he paid as yard conductor?
A. Yard conductor.
Q. And was paid——
A. I did not notice which month.
(Shown to witness.)
Q. During the month of June, '13, he received his pay as yard conductor and conductor?
A. That is the way these checks are made out.
Q. The work was a great deal lighter in summer than winter?
A. Oh, yes.
Q. Wasn't as much freight moving?
A. No.
Q. The fertilizer season is the time that rushes you?
A. Yes, sir.
Q. The cotton season when selling cotton?
A. Yes.
130 Q. Those are the busy seasons?
A. Yes, sir.
Q. In the summer time works gets light?
A. It does.
Q. And you have to reduce your force?
A. We do.
Q. Sometimes in the summer time yard conductors would have to switch?
A. They do.
Q. Now, how many men did you all work in Cayce yard at that time?
A. I cannot say.
Q. You were in charge of the yard?
A. Yes, sir.
Q. And don't know how many men you had working?
A. Yes.
Q. How many did you keep there ordinarily?
A. When business is light, I instruct the yardmaster whenever he sees that he can cut off a switch engine and keep one; that reduces it; we reduce expenses whenever we can. You can easily get the check rolls and find out.
Q. Give me approximately how many yard conductors stay there as a general rule during the busy season?
A. Four in the daytime; two at night, that includes the quarry engine.
Q. How many yard engineers?
A. Have an engineer for each engine. One yardmaster day and one at night.
Q. Have four conductors?
A. Yes, sir.
Q. Each conductor has what crew with him?
A. Two men.
Q. Two switchmen?
A. Yes, sir.

Q. And engineer?
A. Yes.
Q. Have you a station at the yard?
A. No; we have a yard office; we haven't any yard station.
Q. A passenger can get on the train?

The COURT: Don't go in all that.

A. We have no ticket office and no waiting room; I don't deny people get the train there, but we don't sell tickets there.
Mr. TOMPKINS: You have a coal chute?
A. Yes, sir.
Q. Do you have men working there?
A. Yes, sir.
Q. You have shops there?
A. We have.
131 Q. In connection with the yard?
A. In connection with the terminal.
Q. You have car repairers?
A. Yes, sir.
Q. How many employees of the Seaboard in and around that yard?
A. I would not say.
Q. Approximately?
A. I would not guess at it.
Q. You say the yardmaster reports to you?
A. He does.
Q. The yardmaster, you say, had to report to you any disobedience of rules coming under their notice?
A. Yes, sir.
Q. How do you explain Rule 532: "Yardmasters report to the Superintendent and Trainmaster. They have charge of their respective yards, of the making up and distribution of trains and the handling of cars therein; of all employees, while within the yard limits, and must report to the trainmaster all disobedience of rules coming under their notice"; how do you explain that?
A. The rule explains itself there, that is as plain as day; you have the rule there.
Q. Where are your headquarters?
A. Hamlet.
Q. Now, Mr. Thornton, running from Columbia over to Cayce, it is on trestle the whole way?
A. No, not on a trestle all the way, is land in between.
Q. Two blocks between the station down there?
A. Yes, sir; after you get over the long trestle there is land, and another trestle; my recollection is there are two other trestles between here and the bridge after you get over the long trestle.
Q. Get down on the ground?
A. After they get over the long trestle they get on the ground.

The COURT: I do not see any use of all that; the charge is this man was killed in the yard of Cayce. How many trestles, how much ground they run on this side of the river, is a useless waste of time;

whole lot of irrelevant questions are asked; what has that got do with it?

132 Mr. TOMPKINS: He was examining him an hour and a half; I ought to have 30 minutes.

The COURT: You have the right to examine him as long as you want, but I do not see the relevancy, and does not throw light on it.

Mr. TOMPKINS: My object in asking it was this: they have attempted to show it is unnecessary to have a man on the back end of the tender in backing in the yard, whereas they have a rule about it——

The COURT: Go ahead.

Mr. TOMPKINS: With regard to this rule read to you, you still say after you have heard that rule, it was the business of the switchman to complain to you about anything that was wrong there?

A. That rule does not say so.

Q. You said so?

A. No, I didn't.

Q. You did not say that?

A. I did not.

Q. You did not testify Mr. Koennecke had never made complaint to you?

A. I do.

Q. Was it Mr. Koennecke's place to make complaint to you if he found the yard in improper condition?

A. When he was yardmaster it was.

Q. How about this rule which says he must make complaint to the trainmaster and superintendent?

A. That depends on the position he is filling.

Q. The yardmaster must report to the superintendent and trainmaster, and must report to the trainmaster all disobedience of rules?

A. That is true. I have no doubt but what he would have done it while trainmaster.

Q. You do not know the report he made to the people he ought to have reported, after he got to be switchman and yard conductor?

A. I do not.

Q. How long have you been in charge of this yard?

A. Ever since it was open.

Q. Look at that time table; when that time table says

133 South Carolina Division between Columbia and Savannah, etc., that is an error?

A. No.

Q. You said the North Carolina Division goes as far as Cayce?

A. I did; I still say so.

Q. That is not an error?

A. No; that is not the North Carolina time table.

Q. Where is the South Carolina Division?

A. Where that time table says. The South Carolina Division covers from Columbia, and through Cayce to Savannah, and beyond; Cayce is the terminal for the South Carolina Division, freight trains, passenger trains run through to Columbia in order to keep from

stopping through passenger trains at Cayce and give them orders, they put them through to Columbia so can give them telegraphic orders at Columbia, they go through Cayce without stopping. However, if anything happens to the train, South Carolina Division train, between here and Cayce they are responsible to me.

Q. But the town of Cayce is governed by the time table of South Carolina Division?

A. No, sir, governed by the North Carolina Division.

Q. Where is the North Carolina time table?

A. In my pocket. You can check the same train between Columbia and Cayce, and they are shown on both time tables.

Q. Have you got the time table for June, '13?

A. Mr. Lyles has.

Mr. TOMPKINS: Let me see that, Mr. Lyles, please. We offer Seaboard Railway North Carolina Division Time Table No. 2, taking effect 12:01 P. M.——

Mr. LYLES: We object to the introduction of that time table; no rule or figures in it applicable to the case at bar.

Mr. TOMPKINS: This was the time table in use on the North Carolina Division Seaboard 13 June, '13?

A. I presume it was; I do not remember when the next one took effect.

134 Q. The rules on the back of it and general instructions are practically the same year to year?

A. Yes, sir.

Q. Just as the schedules are changed?

A. Yes, sir.

Mr. TOMPKINS: We offer that in evidence.

Mr. LYLES: We object.

The COURT: Note objection; go ahead.

Mr. TOMPKINS: I will read Rule U.

The COURT: Is it not the same as the other?

Mr. TOMPKINS: Rule U is the same in this as in South Carolina one? You testified before in Court?

A. I don't ever remember being on the witness stand before—I have been in Court with the train sheet, but I did not—I was in Court once to prove the block rules.

Q. Didn't you testify in the case of Keenan vs. Seaboard with reference to the coal chute in the park?

A. No, sir.

Mr. LYLES: I will introduce Rules, the first one, No. 18, page 15: "Yard engines will display the headlight to the front and rear by night. When not provided with a headlight at the rear, two white lights must be displayed. Yard engines will not display markers."

Rule 24, page 16: "When cars are pushed by an engine (except when shifting or making up trains in yards), a white light must be displayed on the front of the leading car by night."

Rule 422, page 50: "Every person accepting service does so with a full knowledge of the perils incident to the operation of railways and agrees to exercise due care in the performance of his duties to prevent accidents to himself or others."

Rule 423, page 50: "Employees of every grade are warned to see for themselves, before using, that the places where they are assigned to work and that the machinery, tools or appliances which they are expected to use are in proper condition for the service required; and if not, to put them in proper condition, or see that they are so put, before using them. The company does not wish or ex-
135 pect its employees to incur any risks whatever from which, by exercise of their own judgment or by personal care, they can protect themselves, but enjoins them to take time in all cases to do their duty in safety, whether they may at the time be acting under orders of their superiors or otherwise."

Rule 424, page 51: "Employees are required to inform themselves respecting the location of all structures or obstructions along the line that will not clear them when on top or sides of cars. All employees are cautioned against standing upright on top of covered cars while passing under bridges or through tunnels. All employees are warned not to attempt to get on engines or cars while they are in rapid motion. Under no circumstances must they stand on the track and attempt to get on when engines or cars are approaching them."

The last one, 461, at page 56: "All employees are especially cautioned not to walk or stand upon the tracks except when necessary to do so, and, as far as may be possible, to prevent the public from going thereon."

These rules were taken from the book entitled: "Seaboard Air Line Railway. Rules and Regulations for the Government of the Operating Department." "The rules herein will govern railroads operated by the Seaboard Air Line Railway, taking effect February 1st, 1909, superseding all previous rules and instructions inconsistent therewith. Special instructions may be issued by proper authority. C. H. Hix, General Superintendent. Approved: W. A. Garrett, Chief Executive Officer for the Receivers"; which were effective on the day in question.

S. E. BURNS (white), sworn, says:

Mr. LYLES:

Q. Are you the yardmaster at Cayce?
A. I am.
136 Q. When did you take charge of that position?
A. February 26, 1913.
Q. From that time on was Mr. Koennecke working under you up to his death?
A. Yes, sir.
Q. Did you make out Mr. Koennecke's pay roll?
A. I did.
Q. Tell us what he made?

A. I have the pay roll——

Mr. TOMPKINS: Let us see the pay rolls.

Mr. LYLES: Let the witness testify what he made; he may cross-examine him as far as he pleases.

Mr. TOMPKINS: I think the pay rolls the best evidence.

WITNESS: That is what I have.

Mr. TOMPKINS: Did you make them up?

A. My clerk did; I signed them; I checked them.

Mr. LYLES: We are giving a calculation from these.

The COURT: Do you want to introduce them in evidence?

Mr. LYLES: How much Mr. Koennecke made; he checked up the pay rolls.

The COURT: He can refresh his memory and state what Mr. Koennecke made.

WITNESS: The first month, January,—he did not start to work until about the middle of the month; February, $123.72; March, $130.97; May, $92.30; April, $124.60.

Q. The June check; he was killed in June?

A. Yes, sir; I haven't got a copy of that here,—yes, I have it here, too.

Q. June it was $101.18. Now, Mr. Burns, during the time Mr. Koennecke worked under you in the Cayce yard, did the conditions remain the same, the condition of the walkways between the tracks, the lights, the movement of trains, and such as that?

A. Practically the same.

Q. Any increase in these dangers toward employees during that time; was there any increase in the amount or number of these dangers toward employees during that time?

A. Was not.

137 Q. Did Mr. Koennecke ever complain to you of the condition of the walkways or tracks or lights, or concerning anything in the yard?

A. He did not.

Q. Did you hear Mr. Burns' testimony with reference to the duties of Mr. Koennecke as yard conductor and switchman with reference to walking around the yard, traveling through the yards?

A. Whose testimony?

Q. Mr. Thornton's?

A. Yes, sir.

Q. Was that correct?

A. Yes, sir.

Q. Did Mr. Koennecke seem entirely pleased with his position?

A. Yes, sir.

Q. And satisfied with his work?

A. Yes, sir.

Cross-examination:

Q. Look at these photographs; you heard Mr. Koennecke testify that this photograph is part of the track on which his father was killed?

A. I did not.

Q. You were not here?
A. No, sir.
Q. The testimony is that those photographs were taken a day or two after he was killed, representing the spot; does that correctly represent the condition of things there?
A. No, sir.
Q. What is the difference between that and the real condition?
A. This shows up worse than really were, these clinkers show up larger in this picture than really was, they show up larger in the picture than they were.
Q. Can you explain how that happened?
A. No, sir; I am not a photographer.
Q. The ground between those tracks did have clinkers on it, didn't it?
A. Yes, sir.
Q. It was customary to throw clinkers off between those tracks from box or flat cars?
A. No, sir.
Q. How were they brought there?
A. In clinker cars from clinker pit.
138 Q. How were they unloaded and where?
A. Unloaded between the tracks, sometimes in the middle of tracks; those clinker cars are reversible cars, can dump in the center or side of tracks. The section force is always present when we unload clinkers, and the force immediately levels it down when unloaded.
Q. Who was the yard night, yardmaster at the time Mr. Koennecke was killed?
A. Mr. Warmack, I think.
Q. You came on about the time Mr. Koennecke went off?
A. Yes, sir.

Mr. LYLES:

Q. You say on the night Mr. Koennecke was killed, between tracks 3 and 4, you say this photograph shows the condition as being much worse than really was?
A. I think so.
Q. Were no clinkers, or holes or bumps such as shown in this photograph?
A. I don't think so.
Q. Are you enough photographer to tell whether these are blurred pictures?
A. Look to me to be.
Q. During this time, did you work there at night with Mr. Koennecke?
A. Yes, sir.
Q. Do you happen to know where Mr. Warmack is?
A. No, I don't know.
Q. Do you know whether he has left this section of the country?
A. I understand he has.
Q. Do you know whether an effort was made to locate him?

Mr. TOMPKINS: We object.
The COURT: I do not see the relevancy of that question.

A. C. WINTER (white), sworn, says:

Q. You are claim agent in the employ of the Seaboard?
A. Yes, sir.
139 Q. And your duties are to arrange for the attendance of witnesses at trials?
A. Yes, sir.
Q. Have you made every effort to find Mr. Warmack, who was formerly connected with the Cayce yard?
A. Yes, sir, I have.
Q. Have you been able to locate him?
A. I have not.
Q. Have you made effort in other places as well as Columbia?
A. I have.

Mr. LYLES: I have been unable to prepare myself on the question, on the issue testified to on yesterday. Now, my objection, on which this action was forced to trial, that is dependency, that is the beneficiaries, and on account of my lack of notice that the issue would come in the case, I am entirely unprepared to meet it, and have no evidence to offer on it, because I have had no opportunity to investigate it. My answer stands to this complaint as amended, and I deny the additional facts alleged by this amendment, and I am entitled to any defense that might arise under the Federal Act. That concludes my case.

The COURT: The record is sufficient to show that you objected to the power of the Court to allow the amendment. I think the record shows that you objected to the granting of the amendment on the ground that the Court did not have the power to allow it, that it would change the whole scope.

Mr. LYLES: Yes, sir. You will find in the record also I objected to being forced to trial in this case for the reason I was not prepared to meet the issue of dependency.

The COURT: You can put that down as the other ground, too.

Mr. LYLES: The stenographer has it down.

Mr. TOMPKINS: We announce no testimony in reply.

Mr. LYLES: I have a motion to make to direct a verdict. I am convinced our grounds are well taken. I have them written out.

140 *Grounds for Direction of Verdict.*

"1. Because there is an entire failure of evidence to support the material allegations of the complaint.

"2. Because from the entire evidence the inference cannot be drawn that plaintiff's intestate was employed in interstate commerce at the time he received his injuries resulting in death.

"3. Because plaintiff has failed to sustain the burden of proof resting upon her, by adducing evidence, from which the reasonable inference can be drawn that plaintiff's intestate was employed in

interstate commerce at the time he received the injuries resulting in death.

"4. Because the entire evidence does not admit of the inference that the defendant was guilty of negligence in any of the particulars alleged in the complaint which proximately caused or resulted in the injuries and death of plaintiff's intestate.

"5. Because the only reasonable inference which can be drawn from the entire evidence is that the injuries and death of plaintiff's intestate were proximately caused by his own negligence and not by any negligence on the part of the defendant in the particulars alleged in the complaint.

"6. Because the only inference to be drawn from the entire evidence is that plaintiff's intestate assumed the risks of the dangers and defects which caused his injuries resulting in death.

"7. Because the only allegation of a violation of duty on the part of the defendant as master, toward the plaintiff's intestate as an employee in interstate commerce, which the evidence tends to support, is the failure to furnish plaintiff's intestate with a safe place to work, in that the tracks and walkways between the tracks were in a dangerous and unsafe condition by reason of piles of clinker, cinders and coupling pins, and the entire evidence admits
141 only of the inference that plaintiff's intestate waived the duty of the defendant as master in this particular and assumed the risk of the defects and dangers therefrom in this regard."

(Jury retired, at the direction of the Court, during the discussion of the grounds of the motion to direct a verdict.)

The COURT: Now, Mr. Tompkins, I will ask you this, your specification of negligence is set out in paragraph 6; it seems to me there is no proof in this case, so far as I can see, that the condition of the yard caused the death of this man, that he fell down; no evidence to show that. Let us hear you on that. Suppose the yard was in an uneven condition and unsafe; there is not one particle of evidence that the unsafe condition of the yard in any way contributed to the man's death, because he was struck in the back evidently, and had not stumbled or fallen. I do not see any testimony tending to prove that act of negligence in any way contributed to his death.

Mr. TOMPKINS: That is a question peculiarly in the province of the jury. The man evidently was on the track somewhere; he either fell on the track, if he was trying to walk, and this mass of clinkers and mass of stone, and he was driven from the regular walkway between the tracks, to the middle of the track, and he either fell down or was knocked down by the train and killed. Nobody can presume to say he boarded that car. In addition to that we have other additional acts of negligence.

The COURT: You need not point out all the acts of negligence. If you prove any one act of negligence will be sufficient to sustain it. They say Rule U does not apply to trains running from Columbia to Cayce and stopping on that track and unhitching engine, and getting other cars and bringing them back. That is one act of negligence the jury will have to decide. They say it does not apply

to the movement in the yard, movement from Columbia to Cayce.
It was their business under the rule of the company to have
142 a man on the back of the train when they started from Columbia, and it was his business to be there when they arrived at Cayce, he had no right to jump off and leave the car without guarding against running over people.

(Argued.)

The COURT: The Act of Congress, '08, provided there should be no removal of these cases, where it comes under the Employer's Liability Act to the Federal Court, the matter had to be determined and decided by the State Court. Now, Mr. Lyles contends that in the State Courts, in reaching a decision in any matter brought before the Court, like in the present controversy, that in determining the question whether the case ought to go to the jury or not, that the Court ought to adopt the rules formulated and applied by the Federal Court instead of the rules applied in the State Court. I do not understand what that means. Does it imply that the Judge can adopt the rule as applied in the Federal Court and direct verdicts he would set aside if the jury were to find a verdict, or what does it mean along that line? I am frank to say that if the rule as read by Mr. Lyles, if that is correct, that the rules adopted in the Federal Court apply to the case, that is correct, if that is the law to be applied Mr. Lyles is right. Where is the decision on that?

Mr. LYLES: Every case that has gone to the Supreme Court where they have deteermined the question of negligence under the Federal Act, whether it was started in the Federal or State Court. Now, as to the question of assumption of risk, whether the man was employed in interstate commerce. The rule decided by the United States Supreme Court on the question of negligence, the question of assumption of risk must prevail.

(Argued.)

The COURT: This is an important case, and I will let it go to the jury. Mr. Lyles can carry it to the Supreme Court and get
143 this settled. I am not satisfied. I am satisfied if that rule prevails you are entitled to the direction of a verdict. I am not certain about it.

Mr. TOMPKINS: I can assure your Honor I can prove that is not the rule, and never has been the rule.

The COURT: I am impressed with Mr. Lyles's argument. If that rule applied about a man working in the yard, he did not owe him any special duty and he would be entitled to a direction of a verdict.

Mr. TOMPKINS: The Supreme Court did not have Rule U before them.

The COURT: This is an important case, I want to see it go to the Supreme Court and get it settled. I am going to charge the jury, I do not know whether correct or not, I will charge them if they find this man at the time was not engaged in interstate business in making up cars, and work, at the time, they will have to find for the defendant.

(The jury were brought back into the court room, and the Court charged them as follows:)

Charge.

Mr. FOREMAN AND GENTLEMEN OF THE JURY: This has been a very hotly contested case. I am going to give you the law as I understand it that controls the issues here between these parties. It appears to me that this action was first brought under what is known as Lord Campbell's Act,—that is the State statute; after some testimony was offered the plaintiff made a motion to amend the complaint so as to allege appropriate facts to bring this case within what is known as the Employer's Liability Act. This Employer's Liability Act was passed by Congress some years ago, I think in 1908; that amendment was allowed, and we proceeded with the case.

144 Before charging you upon the issues there are certain matters I want to bring to your attention. The plaintiff, as I stated before, has brought this action under what is known as Lord Campbell's Act, and amended so as to make an appropriate allegation to bring it under the Employer's Liability Act. This being so, the allegation in the complaint which alleges that the deceased came to his death through the wilful, wanton act of the defendant must go out; you cannot recover punitive damages under the Employer's Liability Act, and that matter is not before you for your consideration. Then the complaint sets out the names of two of the children of the deceased, Joseph Theodore Koennecke and Rosalie Watson; counsel admitted in open Court, and the testimony shows, that these two children were not dependent upon their father for support; and, therefore, in the further consideration of this case, if you should find for the plaintiff, those two parties, under this Employer's Liability Act, can get nothing, so their names will disappear from the complaint and the further deliberation of this case. With those preliminary remarks, I will now take up and charge you the law of this case upon the issues as raised by the pleadings and the case as made before the Court.

The plaintiff, as administratrix of the estate of J. T. Koennecke, brings this action to recover damages for the alleged unlawful death of her husband, J. T. Koennecke; and she alleges that by reason of his death she was damaged in the sum of seventy-five thousand dollars.

When a party comes into Court, gentlemen, and makes certain allegations he is bound to prove *it* by the preponderance of the evidence. In this case, in the 6th paragraph of the complaint, the plaintiff specifies the grounds of negligence which she charges against the defendant and which she claims caused the death of her husband. Now, she has got to stand upon the allegations as made in this complaint. If a party makes a number of specifications

145 of negligence, they are not bound to prove all of the specifications, but they must prove some one or more sufficient to entitle them to recover before the jury. But I say the case must be tried upon the allegations as made in this complaint; and it is stated thus: In failing to give the proper warning of the approaching train; in failing to keep a proper lookout and in failing to keep an em-

ployee on the rear of the engine as aforesaid, and by reason of said negligent, careless, wanton and reckless acts the plaintiff's intestate was killed in the performance of his duties as aforesaid. They allege also, in failing to furnish adequate lights for his protection; in having the track and walkways between the tracks in a dangerous and unsafe condition as aforesaid. But, as I stated to you, the allegations of wilfulness and wantonness have no place in this complaint, and it goes out. When they made allegation that this party was engaged in interstate business then that brought it under the Employer's Liability Act, which does not permit punitive damages.

Now, that is substantially the allegations contained in this complaint, and, as I have stated to you before, when a party comes into Court and makes affirmative allegations, charging negligence, and alleging said negligence was the direct and proximate cause of some injury, then the party making such allegations must prove those allegations by the preponderance of the evidence, the greater weight of the evidence does not necessarily mean the greatest number of witnesses that have testified on the stand, but it means such testimony as you, being judges of the facts, give credence to, and which carry conviction to your mind; that is about what it means, and what it is intended to mean.

Now, the defendant answers the complaint, which I have just called briefly to your attention, and the allegations contained therein are as follows: In the first defense, it admits J. T. Koennecke departed this life in the City of Columbia on the 13th day of
146 June, 1913, but denies knowledge and information sufficient to form a belief as to the other allegations of said paragraph; that is, they admit he came to his death, but deni*es* they are responsible for it in any way. It admits the allegation of paragraph 2.

"In answer to paragraph 3, it admits that J. T. Koennecke at the time of his death was in the employ of the defendant as a switchman in the Cayce yards, but denies each and every other allegation in said paragraph contained."

"In answer to paragraph 4 it admits that J. T. Koennecke, while in the employment of the defendant as switchman in its Cayce yards, was run over by a train of the defendant and received injuries from which he died, but it denies each and every other allegation in said p-ragraph contained."

It denies the allegation of any negligence or wrongdoing on its part.

"5. Upon information and belief, it denies each and every allegation contained in paragraph 5."

"6. Upon information and belief, it denies each and every allegation in paragraph 6."

"7. Upon information and belief, it denies each and every allegation contained in paragraph 7."

Now, for a second defense, the defendant sets up what is known in law as contributory negligence. I will charge you later the effect of contributory negligence upon the issues now before the Court.

For a third defense, the defendant sets up what is known in law as assumption of risk; that is they claim that the deceased came to

his death by an obvious risk that he accepted when he entered their employment.

Those are substantially the allegations of the answer of the defendant.

Now, we will go back to the complaint. Before the plaintiff can recover she must satisfy you by the preponderance of the evidence that one or more of the allegations of negligence charged in
147 her complaint is true. What is negligence? Negligence is the failure to observe due care under the circumstances; it is doing something that a person of ordinary prudence would not have done under the circumstances, or it is leaving undone something that a person of ordinary care and prudence would not have left undone under the circumstances. So negligence is a relative term; it is for you to say, under the definition of law, whether or not the defendant was guilty of negligence.

Now, if you find when you go in your jury room to consider the case, if you should conclude that the plaintiff has not made out her case by the preponderance of the evidence, as I have already stated to you, then you write a verdict for the defendant, that would end the matter right here. If, however, you should conclude from the testimony that the plaintiff would be entitled to recover upon her affirmative allegations of her complaint, then you would have to consider the defenses as set up by the defendant Seaboard Air Line as contained and set forth in its answer. The defendant denies the charges of negligence; that put the plaintiff upon the proof; if the plaintiff has failed to prove it by the preponderance of the evidence, that ends the case. If you conclude, however, that plaintiff is entitled to recover upon those affirmative allegations of the complaint, and denial in the answer, then you take up and consider the other two defenses. It is proper for me to state that the defense of contributory negligence under the Employers' Liability Act does not defeat a recovery. I simply mention that at this time.

Now, what is contributory negligence? That is where the negligence of both parties,—would be in this case the negligence of the deceased combining and concurring with the negligence of the defendant that co-operated to bring about his death, and without which it would not have occurred, and the negligence must be the direct, the proximate cause; so, as I should have told you in the first
148 instance, in order to recover for negligence it must be the direct and proximate cause.

When a party sets up contributory negligence, known as an affirmative defense, the defendant has to prove that by the preponderance of the evidence; but, as I stated before, contributory negligence under this Employers' Liability Act does not defeat a recovery, but it goes to the abatement or diminution of damages. In other words, if you should conclude that the plaintiff was entitled to recover on her allegations of negligence, but if you should find and conclude that the deceased was guilty of contributory negligence, then you would abate the amount in accordance with the degree of culpability of the deceased in bringing about and causing his death, his share, the part he took in it, you are to consider that, if you find he was guilty

of contributory negligence, in the event you find for the plaintiff, and abate it to the extent that his negligence entered into the final result. I think that it what the Act means.

Mr. TOMPKINS: Add, under the Employers' Liability Act, it is not required that the negligence of the plaintiff intestate should be the proximate cause. You charged would have to contribute as the proximate cause.

The COURT: I do not think that Act has anything to do with the pleadings at all; it does not say anything about it, does it?

Mr. TOMPKINS: The rule, under the Employers' Liability —, any negligence of the intestate contributing with the negligence of the defendant——

The COURT: I charge you it is not necessary for contributory negligence to be the direct and proximate cause, but if it in any way contributed to the deceased's death, why, then you would have to abate the damages by reducing the amount to the extent that he was negligent. Now, I make this charge at the request of plaintiff's counsel.

Now, gentlemen, the third defense; that sets up what is
149 known in law as assumption of risk. When a party enters the employment of a railroad company, or any other company, he assumes all the ordinary risks incident to his employment; he does not assume any negligence on the part of the master; but if the master is negligent, and he knows it, and with his eyes open he goes on, then it would be for the jury to say whether or not he assumed the risk. Assumption of risk does not grow out of any tort or wrongdoing on the part of either party; it is a contracural relation between the employee and the employer. As I stated before, an employee is presumed to agree, when he enters the service of the master, to assume all the ordinary risks connected with his employment. That is the law on the question of the assumption of risk, and that is plain, you gentlemen can understand it.

This case was brought, as I stated before, under Lord Campbell's Act, and amended so as to bring it under the Employers' Liability Act of Congress. I charge you, if you conclude from the testimony that the deceased was not at the time of his injuries which caused his death engaged in interstate business, or that the company with which he was working, or the carrier was engaged in like business, then, of course, he could not recover. That is a question of fact for you to determine from the testimony in the case, whether or not at the time he was injured he was engaged in and about interstate traffic, interstate business, and that means any business that would be connected with the carriage of freight from one point in one State to a point in another State; for instance, from Columbia, S. C., to Hamlet, N. C.; if he was so engaged in assembling cars for the purpose of taking the train to Savannah, or Hamlet, or any other point beyond the limits of this State, then he would be engaged in interstate business, and that would bring the case under the Employers'
Liability Act; but if you conclude from the testimony he was
150 not so engaged, but was engaged in what is known as intrastate business, this action could not be maintained under the

Employers' Liability Act. This Act deals with matters connected with interstate commerce, which Congress has the right to regulate under the Constitution.

I should state if you find for the plaintiff, and you should conclude from the testimony that the deceased was not guilty of any contributory negligence which in any way led to his death, why, then, that would go out of the case. I should have stated to you also that the burden of proof is on the defendant to show that the plaintiff assumed the risk, or rather that his actions at the time were such as to bring him within the terms of the law.

If you find that the plaintiffs are entitled to recover in this case you will eliminate those two children whose names I called to your attention, and you would find a lump sum, that is you would say, We find for the plaintiff, so many dollars, and proportioned in the following manner, the widow so much, stating how much she is entitled to, and state how much each of the other children is entitled to, and aggregate the amount you give the wife and children, equal to the lump sum you find.

I have been requested to charge certain propositions of law by the plaintiff and defendant. Mr. Monteith, I have charged so much of your requests, do you want me to read all these requests over? I will read some I have marked; the others I think I have already covered.

"4. If the plaintiff has proved her case, as I have stated to you; that is, if the defendant was negligent in one or more of the particulars set out in the complaint and that as a result or proximate cause of the defendant's negligence her intestate was run over and killed, the defendant company is liable to the plaintiff in damages."

I have already charged you that.

151 "6. The defendant, as one of its defenses, has set up what is known in law as contributory negligence; that is that the deceased himself was guilty of negligence which contributed to his injury. I charge you that the defendant having set up this defense has the burden of proving same, just the same as the plaintiff has the burden of proving that the defendant was negligent."

I have already charged you that.

"7. If the defendant has proved to your satisfaction that the plaintiff's intestate was guilty of any contributory negligence, then I charge you after you have found the amount to which the plaintiff is entitled in the absence of contributory negligence, that is, in case you believe that the plaintiff is entitled to recover, then you must abate that sum by an amount which you find represents the deceased- proportionate contributory negligence."

I charge you that.

I have covered the 8th.

"9. The defendant has also set up as one of its defenses what is known as assumption of risk. That means that where one man enters the employ of another he assumes the risk which arises from the ordinary pursuit of the business. This defense, like that of contributory negligence, is set up by the defendant and the burden of proving same is upon the defendant."

I have already charged you that.

"10. Now, as to the kind of damages which you can award in this case, if you should find that the plaintiff is entitled to recover. I charge you that you can only allow damages which will compensate those entitled to recover, who have shown that they sustained some pecuniary loss by reason of the death of the intestate upon whom they were dependent."

I charge you that.

152 "11. In arriving at the amount of damages to award in case you find for the plaintiff, you can take into consideration the earning capacity of the deceased, his expectancy in life, that is how many years would he reasonably have lived and continued to contribute to the support of those dependent upon him; his habits, character and also the amount which the testimony shows he did contribute to the support of those dependent upon him."

I charge you that.

"12. I charge you that you cannot allow any punitive damages in this case."

I have already charged you that.

I think the 13th——

Mr. MONTEITH: I do not insist on that.

The COURT: I think I covered that.

Requests for the defendant; the first I charge you.

Mr. MONTEITH: As to my first request. Will your Honor read the Employers' Liability Act to the jury?

The COURT: I do not know that it is necessary to read the whole of the Act to the jury.

The defendant's requests to charge:

"1. Plaintiff has alleged that plaintiff's intestate was employed in interstate commerce at the time he received the injuries resulting in death, and unless the plaintiff has established this allegation by the preponderance or greater weight of the testimony then your verdict shall be for the defendant."

I charge you that.

"3. There is no evidence tending to show that the failure of the defendant to have the tracks and the walkways between the tracks in a safe and proper condition was a proximate cause of plaintiff's intestate's injuries and death, and the jury cannot consider this allegation of the complaint."

153 I charge you that. I refuse the other requests.

Mr. TOMPKINS: In connection with Mr. Monteith's suggestion, will your Honor read Section 3?

The COURT: Let me see it. (Act handed to the Court.)

The COURT: This section is what is known as the Employers' Liability Act. (Section 3 read.)

If you find for the plaintiff, write a lump sum, say, We find for the plaintiff, so many dollars, and proportion it out, say for the widow so many dollars, and if one or more of the children, name them, so many dollars. I have the original complaint; I have checked the two names that ought to go out, you cannot give them

anything, if you give anything at all you give to the three, and it is proportioned among them.

Write your verdict in letters and not figures, and sign your name as foreman. If you find for the defendant, say, We find for the defendant, and sign your name as foreman.

Mr. LYLES: Certain matters I think your Honor overlooked. I will call your attention to them; first in charging on the assumption of risk. I claim the benefit of the decision in the Hallman case, in failing to extend, in the assumption of risk, any defects even though the master was negligent.

The COURT: I charge you, if any defect in the place where he was required to work, even if it was negligence, and he knew it, he could not recover anything. I charge you that, and I have already charged that.

Mr. LYLES: Tell the jury we had in issue the question of dependency; two of the children they claim for; that is denied by our pleadings. We haven't had the chance to bring any evidence on that point; that is in issue.

The COURT: That is in issue. If you find those two children are not dependent upon their father for support, you could not give them anything under this Employers' Liability Act. You are to award pecuniary loss or damage that they have sustained, the
154 beneficiaries, and if you find any of these parties who have not been actually excluded were not dependent for support, you would not give them anything.

Take the record and find your verdict.

At the conclusion of his Honor's charge, on May 22nd, 1914, the jury retired and subsequently, on the same day, returned the following verdict:

Verdict.

We find for the plaintiff twenty-two thousand and five hundred dollars—Mrs. Beauregard Koennecks twelve thousand and five hundred dollars, Edith May Koennecke seven thousand dollars, George Koennecke, three thousand dollars.

L. H. KELLY, *Foreman.*

22 May, 1914.

Notice of Motion for New Trial.

Immediately upon the rendition of the verdict, defendant's attorney duly gave notice of a motion for a new trial upon the minutes, which was duly entered. The Court, desiring to adjourn sine die on May 22nd, without it being convenient for his Honor to hear the motion, and his Honor's appointment as Special Judge being still effective during the Court of General Sessions, which convened on May 25th and adjourned on June 4th, and also for another term of the Court of Common Pleas, which convened on June 7th and ad-

journed on June 26th, by agreement of all parties, the motion
155 was marked heard by his Honor and was subsequently taken up in June, at which time the defendant presented and argued the following grounds:

Grounds of Motion for New Trial.

The defendant on its motion for a new trial on the minutes presents the following grounds why its motion should be granted:

1. Because his Honor having charged the defendant's third request, as follows:

"3. There is no evidence tending to show that the failure of the defendant to have the tracks and the walkways between the tracks in a safe and proper condition was a proximate cause of plaintiff's intestate's injuries and death and the jury cannot consider this allegation of the complaint,"

and this having eliminated from the consideration of the jury the violation of any duty on the part of the defendant to plaintiff's intestate in having the tracks and walkways, etc., in an improper and unsafe condition, there was no evidence of any other violation of duty or negligence on the part of the defendant proximately resulting in injury and death to plaintiff's intestate, and the verdict must be set aside as a matter of law.

2. Because the verdict is greatly excessive under the evidence according to the rule of damages applicable under the Federal Employers' Liability Act.

3. Because the clear preponderance of the testimony admitted only of the inference that plaintiff's intestate was guilty of contributory negligence, and from the size of the verdict, it is apparent that the jury did not discharge its duty of reducing the damages in proportion to the negligence of plaintiff's intestate.

156 The defendant also asks for a reduction of the verdict by way of a new trial nisi, upon the grounds:

1. That the verdict is excessive under the rule of damages applicable under the Federal Act, and

2. Because the clear preponderance of the testimony admitted only of the inference that plaintiff's intestate was guilty of contributory negligence and the jury did not discharge its duty of reducing the damages in proportion to such contributory negligeence.

LYLES & LYLES,
Attorneys for Defendant.

At the conclusion of the argument, his Honor reserved his decision and on the 19th day of June duly signed and filed the following Order refusing the motion:

Order.

This was a motion for a new trial made by the attorney for the defendant on grounds filed in the record. After a due considera-

tion of those grounds, and after full argument by the attorneys for both the plaintiff and the defendant, I am convinced that the motion should be refused.

It was strongly urged that the amount of this verdict was excessive, and I have considered the matter in all its phases according to the rules established by the courts for determining the measure of damages, together with all the facts and circumstances of this case, and after a full consideration, I am of the opinion that this amount was not excessive.

It is, therefore, ordered, that the motion for a new trial be, and the same is hereby, overruled.

W. A. HOLMAN,
Presiding Judge.

Columbia, S. C., June 19, 1914.

157 In the meantime, on the 1st day of June, 1914, the defendant served the following

Notice of Intention to Appeal.

Please take notice, That the defendant, reserving the right to have decided its motion for a new trial heretofore made, intends to appeal to the Supreme Court of South Carolina from the judgment entered or to be entered in favor of plaintiff on the verdict of the jury, in the event that defendant's said motion for a new trial is denied, upon exceptions to be hereafter served upon you, together with the Case for Appeal.

LYLES & LYLES,
Attorneys for Defendant.

To Frank G. Tompkins, Esqr., C. S. Monteith, Esqr., and W. H. Cobb, Esqr., Attorneys for Plaintiff.

June 1st, 1914.

Judgment was duly entered for plaintiff on the verdict, and on the 27th day of June, the defendant duly served the following

Notice of Intention to Appeal.

Please take notice, That the defendant intends to appeal to the Supreme Court of South Carolina from the judgment entered or to be entered on the verdict in favor of plaintiff in this case and from the Order of his Honor, W. A. Holman, Special Presiding Judge, dated June 19th, 1914, refusing defendant's motion for a new
158 trial, upon Exceptions to be hereafter served upon you together with the Case for Appeal.

LYLES & LYLES,
Attorneys for Defendant.

June 27, 1914.

To C. S. Monteith, Esqr., Frank G. Tompkins, Esqr., and W. H. Cobb, Esqr., Attorneys for Plaintiff.

Case and Exceptions.

Thereafter, the time having been extended, the above and foregoing Case was served and agreed to, together with the following

Exceptions.

1. Because his Honor erred in allowing plaintiff, over defendant's objection, during the trial of the case and following the examination of plaintiff's witness, T. A. Barker, to amend her complaint and in granting an Order to this effect, as follows:

"Ordered, 1. That paragraph two of the complaint be, and the same is hereby, amended by adding after the word 'Railway,' on line seven of the complaint, the words 'from the City of Hamlet, in North Carolina, to the City of Savannah, Georgia, through the States of North Carolina, South Carolina and Georgia.'

"2. That the complaint be amended in paragraph three by adding after the words 'South Carolina,' on the last line of said paragraph, the words 'and was engaged in switching cars, making up and breaking up trains running and operating between Columbia, in the State of South Carolina, and Hamlet, in the State of North
159 Carolina, and between Columbia, in the State of South Carolina, and Savannah, in the State of Georgia, the said trains carrying freight between these points.'"

The error being:

a. That his Honor should have sustained defendant's objection that such so-called amendment was beyond his Honor's power, because it changed substantially plaintiff's claim and amounted to the insertion, by way of the so-called amendment, of a totally new and distinct cause of action.

b. His Honor having correctly ruled that the Act of Congress, known as the Federal Employers' Liability Act, entirely superseded the South Carolina Lord Campbell's Act "where the party was engaged at the time in interstate business," and having further correctly ruled that "when it comes down to a death action (the Federal Act) absolutely supersedes the State law, and gives a new cause of action by the personal representative for the benefit of all parties dependent upon him for support," and having further correctly ruled that under the Federal Act no punitive damages could be recovered, while punitive damages were alleged and claimed under this original complaint, and having further correctly sustained defendant's counsel's objection that his Honor had no power under the practice of this State to grant such a motion to amend, and having told counsel for defendant that he did not care to hear further from counsel on that point, correctly ruling: "That is substantially an entirely different cause of action—you can amend during the trial, provided it does not substantially change the cause of action, and you will have to do that. You cannot stand on this complaint as it is now; it is an entirely different action. During the trial of a case the Judge cannot substitute an entirely different action. As

Mr. Lyles says, it is as different as anything could be; it is an entirely different cause of action. I would not have jurisdiction to do that."

And further correctly ruling: "Let me suggest to you, this is
160 not an amendment: you cannot amend a suit brought under Lord Campbell's Act, so as to bring it under the Act of Congress. When an action is brought under the State statute, and the other under the Federal statute, that is substituting an absolutely different action. Your suit is brought technically under Lord Campbell's Act."

His Honor then erred in changing such correct rulings and conclusions and in erroneously concluding: "Since hearing argument, I am satisfied that the State, having complete control over the whole matter—pleadings—would have the right to allow the amendment." And on these grounds, his Honor erred in ruling and concluding that he had the power to grant the amendment, and erred in granting the order allowing the amendment.

c. That there was then no evidence before the Court permitting the inference that plaintiff's intestate was employed by defendant in interstate commerce at the time of his injury and death, and the amendment was not permissible, therefore, to conform the complaint to the facts proved, which was the ground upon which it was allowed.

2. That his Honor erred in ruling during the argument on the motion of plaintiff to be allowed to amend her complaint, that testimony had been developed tending to show that plaintiff's intestate was engaged in interstate commerce at the time of his injury and death and that the question was whether the complaint could be amended to conform to this testimony.

The error being that there was no testimony admitting of the inference that plaintiff's intestate was so employed.

3. That his Honor having concluded that he had the power to grant the amendment requested by plaintiff, erred in exercising his discretion in favor of the plaintiff by granting the amendment, and in so doing, abused his discretion. The abuse and erroneous exercise of discretion being that it appeared that plaintiff had had
161 ample opportunity before the trial of the case to discover the facts, claimed to have been developed on the trial from her own witness, and her attorneys having full knowledge, actual or presumptive, of the difference between an action under the Lord Campbell's Act of this State and the Federal Employers' Liability Act, had ample opportunity, before the trial, to discover the true facts, and consequently, the statute and rule of law governing, since they well knew that plaintiff had the election as to which statute the action should be brought under, and, therefore, plaintiff and her attorneys having had the opportunity to discover the facts before the trial, and being under a duty so to do, there was no emergency or surprise on the part of the plaintiff that justified his Honor in allowing the amendment during the trial and without notice to defendant.

4. That his Honor, having concluded that he had the power to grant the amendment and having so ruled, and having further ruled

that if counsel for defendant should say that defendant could not go to trial and that defendant was taken by surprise, his Honor would not force defendant to trial, and after considerable argument his Honor, having asked defendant's counsel this specific question: "Do you say, Mr. Lyles, that you are taken by surprise; if so, I don't think I ought to force you. I have decided I have the power, and I think the amendment ought to be allowed, and the case ought to proceed, unless you say, on account of the change, you will be taken by surprise." And counsel for defendant having replied: "If your Honor requires me to speak, I will be careful in what I say. I cannot say I am not familiar with the Federal Employers' Liability Act of Congress. I am not prepared to meet the issue this change of dependency will bring out." And counsel for defendant having further explained that defendant was not prepared to meet the very material issue of the dependency of the beneficiaries of plain-
162 tiff's intestate made issuable for the first time by the amendment, and that defendant could not safely go to trial without reasonable opportunity to prepare to meet such issue, on which defendant was not prepared and was taken by surprise, and his Honor having then ruled and defendant's counsel replied as follows:

"The COURT: I told you if you are not ready to go to trial in this case, I will not force you.

"Mr. LYLES: I am not ready to go to trial. I am not ready to meet the issue of dependency."

And defendant's counsel having further explained and protested against proceeding, his Honor erred in ruling and ordering:

"The COURT: Proceed with the trial of the case. Counsel ought to have known that this question would come up anyway."

And erred in requiring defendant to proceed with the trial.

The error being:

a. That defendant had a legal right to a reasonable opportunity to prepare to meet the very material issue of dependency which was brought into the case for the first time by the so-called amendment bringing the case under the Federal Act, and having made that fact appear to the Court in the manner required by the Court, and having protested to the Court in the manner required its unpreparedness to proceed with the trial, and having presented to the Court defendant's demand for a postponement of the trial under the so-called amended complaint, it was error of law for his Honor to deprive defendant of this legal right by forcing it to continue the trial.

b. That such procedure deprived defendant of its property without due process of law and denied to defendant the equal pro-
163 tection of the laws, in violation of the Fourteenth Amendment of the Constitution of the United States, and Article I, Section 5, of the Constitution of South Carolina, in that such procedure suffered and caused a judgment to be rendered against the defendant on a pleading or proceeding of which defendant had no notice and no opportunity to answer and define the issues and no opportunity to prepare to meet the material issues raised thereby.

c. That it was an abuse of discretion for his Honor to force de-

fendant to proceed with the trial under the so-called amended complaint after the statements and protests of defendant's counsel that it was not prepared to do so and would be materially and seriously prejudiced by so doing.

5. That his Honor erred in ruling as follows:

"The COURT: Proceed with the trial of the case. Counsel ought to have known that this question would come up anyway.

"Mr. LYLES: I do not want to get on the record wrong.

"The COURT: You had the opportunity to continue the case, and would not avail yourself of it; it is not my fault. I left it in your hands, and you would not avail yourself of it. I was going to continue the case, if you had said, under the circumstances, you could not go to trial."

The error being that defendant's counsel had availed himself of the opportunity to continue the case in the manner required by his Honor and had explicitly and repeatedly stated to the Court that defendant was not ready to proceed with the trial, had protested against being forced so to do and had explained to the Court at length the reasons why defendant's material rights would be prejudiced; and defendant had availed itself of the opportunity given by his Honor and had met the test required by his Honor for continuing the case, and had explicitly stated that, under the circum-
164 stances, it could not go to trial; and his Honor in this ruling and in forcing defendant to trial, disregarded and overruled the very tests set by himself for a continuance.

6. That his Honor erred in refusing defendant's motion for a nonsuit made during the argument on the motion of plaintiff to amend her complaint, as follows:

"Mr. LYLES: If your Honor rules you have the power to make the amendment, before we get to the question whether you are going to grant it or not, I submit I am entitled to a nonsuit in the case, on the question of power. We are entitled to go forward with this trial on the pleadings as they now stand; and if they are not going forward, I think I am entitled to a nonsuit as the case now stands. That is to keep this record straight on the question of power to grant the amendment. I am convinced the Court has no power to grant it."

The error being that plaintiff having announced that she would not proceed with the trial on the complaint, as it stood, it was beyond the power of his Honor to allow the amendment moved for by plaintiff, substantially changing plaintiff's claim and inserting in the complaint a new and distinct cause of action, and since plaintiff had announced that she would not proceed on her complaint as it then stood, the only solution was to nonsuit the case without prejudice to what further action plaintiff might subsequently institute.

7. Because his Honor erred in refusing to direct a verdict for defendant, for the reasons stated by defendant in its second ground, as follows:

"2. Because from the entire evidence the inference cannot be drawn that plaintiff's intestate was employed in interstate commerce at the time he received his injuries resulting in death."

165 8. Because his Honor erred in refusing to direct a verdict for defendant, for the reasons stated by defendant in its third ground, as follows:

"3. Because plaintiff has failed to sustain the burden of proof resting upon her, by adducing evidence, from which the reasonable inference can be drawn that plaintiff's intestate was employed in interstate commerce at the time he received the injuries resulting in death."

9. Because his Honor erred in refusing to direct a verdict for defendant, for the reasons stated by defendant in its fourth ground, as follows:

"4. Because the entire evidence does not admit of the inference that the defendant was guilty of negligence in any of the particulars alleged in the complaint which proximately caused or resulted in the injuries and death of plaintiff's intestate."

10. Because his Honor erred in refusing to direct a verdict for defendant, for the reasons stated by defendant in its fifth ground, as follows:

"5. Because the only reasonable inference which can be drawn from the entire evidence is that the injuries and death of plaintiff's intestate were proximately caused by his own negligence and not by any negligence on the part of the defendant in the particulars alleged in the complaint."

11. Because his Honor erred in refusing to direct a verdict for defendant, for the reasons stated by defendant in its sixth ground, as follows:

"6. Because the only inference to be drawn from the entire evidence is that plaintiff's intestate assumed the risks of the dangers and defects which caused his injuries resulting in death."

166 12. Because his Honor erred in refusing to direct a verdict for defendant, for the reasons stated by defendant in its seventh ground, as follows:

"7. Because the only allegation of a violation of duty on the part of the defendant as master, toward the plaintiff's intestate as an employee in interstate commerce, which the evidence tends to support is the failure to furnish plaintiff's intestate with a safe place to work, in that the tracks and walkways between the tracks were in a dangerous and unsafe condition by reason of piles of clinkers, cinders and coupling pins, and the entire evidence admits only of the inference that plaintiff's intestate waived the duty of the defendant as master in this particular and assumed the risk of the defects and dangers therefrom in this regard."

13. Because, on the motion for the direction of a verdict, his Honor, having ruled that he was not satisfied as to the disposition of the motion, and having plainly indicated his serious doubt as to whether the plaintiff had offered any evidence which entitled plaintiff to have the case submitted to the jury, his Honor then erred in solving such doubt by casting upon the defendant the burden of carrying the case to the Supreme Court, whereas, since plaintiff bore the burden of proof in the cause and the burden of establishing her case under the law, his Honor should have solved such doubt in favor of the defendant, and cast upon plaintiff the burden of appealing the case to the Supreme Court.

14. Because his Honor refused defendant's second request to charge, as follows:

"2. There is no evidence tending to sustain the allegation that there were no lights in the yard, adequate for the proper protection of plaintiff's intestate in the performance of his duties, or tending to show that the negligence of the defendant in this particular
167 was a proximate cause of the injuries and death of plaintiff's intestate, and the jury cannot consider this allegation of the complaint."

The error being that there was no evidence to support the allegation of the complaint in said request referred to, and the defendant was entitled to have the jury so instructed.

15. Because his Honor refused defendant's fourth request to charge, as follows:

"4. There is no evidence to support the allegation that the defendant was negligent in that the train which ran over and killed plaintiff's intestate consisted of an engine and a great number of box cars, to the amount of more than twelve, or that such negligence was a proximate cause of the injuries and death of plaintiff's intestate, and the jury cannot consider this allegation of the complaint."

The error being that there was no evidence to support the allegation of the complaint in said request referred to, and the defendant was entitled to have the jury so instructed.

16. Because his Honor refused defendant's fifth request to charge, as follows:

"5. There is no evidence of negligence on the part of the defendant in that the engine was backing, with the tender in front pulling the box cars behind, and no evidence that this was a proximate cause of the injuries and death of plaintiff's intestate, and the jury cannot consider this allegation of the complaint."

The error being that there was no evidence to support the allegation of the complaint in said request referred to, and the defendant was entitled to have the jury so instructed.

168 17. Because his Honor refused defendant's sixth request to charge, as follows:

"6. There is no evidence that the defendant was negligent in that no lookout was kept by the agents of the defendant on the engine which ran over plaintiff's intestate and no evidence that such negligence was a proximate cause of the injuries and death of plaintiff's intestate, and the jury cannot consider this allegation of the complaint."

The error being that there was no evidence to support the allegation of the complaint in said request referred to, and the defendant was entitled to have the jury so instructed.

18. Because his Honor refused defendant's seventh request to charge, as follows:

"7. There is no evidence of negligence on the part of the defendant in failing to have an employee on the rear of the engine which it is claimed ran over the plaintiff's intestate, since the entire evidence shows that this was a switch engine, in yard service at the time and not moving on the main line, and there is no evidence that

such negligence was a proximate cause of the injuries and death of plaintiff's intestate, and the jury cannot consider such allegations of the complaint."

The error being that there was no evidence to support the allegation of the complaint in said request referred to, and the defendant was entitled to have the jury so instructed.

19. Because his Honor charged the jury as follows:

"In this case, in the 6th paragraph of the complaint, the plaintiff specifies the grounds of negligence which she charges against the defendant and which she claims caused the death of her husband. Now, she has got to stand upon the allegations as made
169 in this complaint. If a party makes a number of specifications of negligence, they are not bound to prove all of the tions, but they must prove some one or more sufficient to hem to recover before the jury. But I say the case must be pon the allegations as made in this complaint; and it is stated thus. In failing to give the proper warning of the approaching train; in failing to keep a proper lookout and in failing to keep an employee on the rear of the engine, as aforesaid, and by reason of said negligent, careless, wanton and reckless acts, the plaintiff's intestate was killed in the performance of his duties as aforesaid. They allege also, in failing to furnish adequate lights for his protection; in having the track and walkways between the tracks in a dangerous and unsafe condition as aforesaid."

The error being that there was no evidence of negligence on the part of the defendant, operating as a proximate cause of the injuries and death of plaintiff's intestate, in the following particulars:

a. In failing to give the proper warning of the approaching train.

b. In failing to keep a proper lookout and in failing to keep an employee on the rear of the engine.

c. In failing to furnish adequate lights for his protection.

d. In having the track and walkways between the tracks in a dangerous and unsafe condition.

And the defendant having specifically requested his Honor to eliminate each one of these issues from the jury by charging the jury that there was no evidence to support them, it was error for his Honor to submit these issues to the jury.

20. Because his Honor refused defendant's eighth request, as follows:

"8. It is not the duty of the crew of a switching engine
170 moving through switching yards to ring the bell or give other signals for the benefit of an employee whose duties require him to work in the yards and who knows or by the exercise of ordinary care could know that switching engines were constantly moving through the yards, and who should reasonably anticipate and expect the engine in question, it being the duty of such employee to be on the lookout for the switching engine and not the duty of the crew of the switching engine to be on the lookout for the employee."

The error being that this was a correct proposition of law to enable the jury to determine the issues of fact submitted to them according to law, and should have been charged.

21. That his Honor erred, as a matter of law, in refusing the defendant's motion for a new trial, for the reasons set forth in its first ground of such motion, as follows:

"1. Because his Honor having charged the defendant's third request, as follows:

" '3. There is no evidence to show that the failure of the defendant to have the tracks and the walkways between the tracks in a safe and proper condition was a proximate cause of plaintiff's intestate's injuries and death and the jury cannot consider this allegation of the complaint,'

"And this having eliminated from the consideration of the jury the violation of any duty on the part of the defendant to plaintiff's intestate in having the tracks and walkways, etc., in an improper and unsafe condition, there was no evidence of any other violation of duty or negligence on the part of the defendant proximately resulting in injury and death to plaintiff's intestate, and the verdict must be set aside as a matter of law."

22. That his Honor abused his discretion in refusing to grant the defendant a new trial upon the grounds that the verdict was
171 excessive and that the jury had failed to reduce the damages in proportion to the negligence of plaintiff's intestate, as set forth in defendant's second and third grounds of its motion for a new trial, as follows:

"2. Because the verdict is greatly excessive under the evidence according to the rule of damages applicable under the Federal Employers' Liability Act."

"3. Because the clear preponderance of the testimony admitted only of the inference that plaintiff's intestate was guilty of contributory negligence, and from the size of the verdict, it is apparent that the jury did not discharge its duty of reducing the damages in proportion to the negligence of plaintiff's intestate."

23. That his Honor abused his discretion in refusing to reduce the verdict by way of a new trial nisi upon the grounds and for the reasons set forth by defendant in its motion, as follows:

"The defendant also asks for a reduction of the verdict by way of a new trial nisi upon the grounds:

"1. That the verdict is excessive under the rule of damages applicable under the Federal Act, and

"2. Because the clear preponderance of the testimony admitted only of the inference that plaintiff's intestate was guilty of contributory negligence and the jury did not discharge its duty of reducing the damages in proportion to such contributory negligence."

24. That his Honor erred in ruling as follows on the motion of the defendant for the direction of a verdict:

"The COURT: You need not point out all the acts of negligence. If you prove any one act of negligence will be sufficient to sustain it. They say Rule U does not apply to train running from Columbia to Cayce and stopping on that track and unhitching engine, and getting other cars and bringing them back. That is one act
172 of negligence the jury will have to decide. They say it does not apply to the movement in the yard, movement from

Columbia to Cayce. It was their business under the rule of the company to have a man on the back of the train when they started from Columbia, and it was his business to be there when they arrived at Cayce, he had no right to jump off and leave the car without guarding against running over people."

The error being that the entire evidence admitted only of the inference that Rule U did not apply to the engine and cars which killed plaintiff's intestate, as they were switching in the yard, off of the main line. And, further, that the entire evidence did not admit of the inference that it was the business of defendant, either under said rule or under the law governing the cause, to have a man on the back of the train or engine which killed plaintiff's intestate to look out for or warn plaintiff's intestate, an employee in the switching yard.

25. Because his Honor erred in admitting, over the objection of the defendant, on the examination of plaintiff's witness Barker, and on the cross-examination of defendant's witness Thornton, certain rules and more particularly, Rule U, found in the so-called time table of the defendant company, and in allowing said rule to be read to the jury, as follows:

"Cars will not be moved in front of engine, or engine moved backward, unless there is an employee on the front of the moving car, or on the rear of the engine, to keep a lookout, in the direction the movement is being made, to avoid striking persons or obstructions on track. Enginemen, as well as conductors, will be held responsible for violation of this rule."

The error being that the rule was irrelevant and had no application to the engine or cars that injured plaintiff's intestate, be-
173 cause such engine and cars were engaged exclusively in switching service in the yard, off of the main line of the defendant and were not subject to any of the rules or regulations contained in said time table, which applied only to trains in service on the main line of the defendant, and the admission of the said rule was prejudicial in that it erroneously led the jury to believe such rule required an employee to be on the rear end of the engine to keep a lookout in the direction a movement was being made, to avoid striking persons, even though such engine was off of the main line and engaged exclusively in switching service in the yard.

26. Because his Honor erred in admitting, over defendant's objection, two small kodak pictures claimed to have been taken by the plaintiff's witness, J. F. Koennecke, defendant's objection thereto being as follows:

"Mr. LYLES: I do not think those pictures are competent. Not identified here as the place where Mr. Koennecke was killed.

"The COURT: He said it was pointed out to him.

"Mr. COBB: He said he saw the blood there.

"Mr. LYLES: You have to identify a thing before you put it in evidence, cannot put it in by information given by other people. The pictures are small kodak pictures—almost impossible to tell anything from them."

The error being that the photographs were so small, obscure

and indefinite that it was impossible to ascertain from them any correct idea of the condition of the yard at the point where plaintiff's intestate was struck, and they were not properly identified as correct photographs of the locus.

174 *Defendant's Requests.*

Which were refused are as follows:

2. There is no evidence tending to sustain the allegation that there were no lights in the yard, adequate for the proper protection of plaintiff's intestate in the performance of his duties, or tending to show that the negligence of the defendant in this particular was a proximate cause of the injuries and death of plaintiff's intestate, and the jury cannot consider this allegation of the complaint.

4. There is no evidence to support the allegation that the defendant was negligent in that the train which ran over and killed plaintiff's intestate consisted of an engine and a great number of box cars, to the amount of more than twelve, or that such negligence was a proximate cause of the injuries and death of plaintiff's intestate, and the jury cannot consider this allegation of the complaint.

5. There is no evidence of negligence on the part of the defendant in that the engine was backing, with the tender in front pulling the box cars behind, and no evidence that this was a proxivate cause of the injuries and death of plaintiff's intestate, and the jury cannot consider this allegation of the complaint.

6. There is no evidence that the defendant was negligent in that no lookout was kept by the agents of the defendant on the engine which ran over plaintiff's intestate and no evidence that such negligence was a proximate cause of the injuries and death of plaintiff's intestate, and the jury cannot consider this allegation of the complaint.

7. There is no evidence of negligence on the part of the defendant in failing to have an employee on the rear of the engine, which it is claimed ran over plaintiff's intestate, since the entire evidence shows that this was a switch engine, in yard service at the time and not moving on the main line, and there is no evidence that
175 such negligence was a proximate cause of the injuries and death of plaintiff's intestate, and the jury cannot consider such allegations of the complaint.

8. It is not the duty of the crew of a switching engine moving through switching yards to ring the bell or give other signals for the benefit of an employee whose duties require him to work in the yards and who knows or by the exercise of ordinary care could know that switching engines were constantly moving through the yards, and who should reasonably anticipate and expect the engine in question, it being the duty of such employee to be on the lookout for the switching engine and not the duty of the crew of the switching engine to be on the lookout for the employee.

Stipulation.

It is stipulated that the above and foregoing constitutes the Case for Appeal on the appeal to the Supreme Court in this cause, as settled by the Order of his Honor, W. A. Holman, Special Judge, who heard the cause. And it is agreed that the same shall constitute the return in the Supreme Court and that no other or further return need be filed, and that the filing of a return in the Circuit Court is waived.

The misplacement of "Defendant's Requests" by the printer to be disregarded.

C. S. MONTEITH,
FRANK G. TOMPKINS,
W. HAMPTON COBB,
Per F. G. T.,
Attorneys for Plaintiff-Respondent.
LYLES & LYLES,
Attorneys for Defendant-Appellant.

Columbia, S. C., Nov. 11, 1914.

176 THE STATE OF SOUTH CAROLINA:

In the Supreme Court, November Term, 1914.

No. 4.

B. M. KOENNECKE, Adm'x, &c., Respondent,
vs.
SEABOARD AIR LINE RAILWAY, Appellant.

Opinion of D. E. Hydrick, A. J.

Plaintiff brought this action to recover damages for the alleged wrongful killing of her intestate by the defendant. The complaint states a cause of action under the state statute. There is no allegation that, at the time he was killed, deceased was employed in interstate commerce, or that defendant was engaged in such commerce. Nor are any facts alleged from which, by reasonable intendment, such employment or engagement can be inferred. Nor does defendant set up in its answer any facts which directly, or by reasonable intendment, bring the case under the federal statute. The allegation of the complaint that deceased left a widow and four children, who were dependent upon him, is appropriate to an action under the federal statute, and while the allegation of dependency is not strictly necessary, it is not wholly inappropriate to an action under the state statute; because the damages recoverable under the state statute are such as the jury "may think proportioned to the injury resulting from such death to the parties respectively for whom and

for whose benefit such action shall be brought." Barksdale v. Ry. 76 S. C. 183.

Therefore as neither plaintiff nor defendant set up or claimed any right or immunity under the federal statute, there would
177 have been no error, if all evidence tending to prove facts sufficient to bring the case under that statute had been excluded. Mims v. R. Co. MSS. filed April 3, 1915. That such right or immunity must be specially set up or claimed at the proper time and in the proper way cannot be controverted. Oxley Stove Co. v. Butler Co. 166 U. S. 648.

But, on cross-examination of one of plaintiff's witnesses, defendant brought out testimony, without objection, which tended to prove facts sufficient to bring the case under the federal statute. So long as that testimony remained in the record, either side had the right to claim the benefit of the federal statute, even without amendment of the complaint or answer. Toledo &c. R. Co. v. Slavin, 35 Sup. Ct. Rep. 306. But, when that testimony came out, plaintiff moved to amend her complaint by alleging facts to bring the case under the federal law, and her motion was granted. Defendant resisted the motion to amend on the ground that the amendment would substantially change the plaintiff's claim by substituting one cause of action for another, and denied the power of the court to grant such an amendment. Strictly and very technically speaking, it may be that the amendment substituted one cause of action for another; though it would, perhaps, be more nearly correct to say that the cause of action is the same, whether the action be brought and tried under the state or the federal law; and, since the principal differences between an action under the state and federal law lie in the authority by which the right of action is given and in some of the rules of law applicable in the determination of the rights of the parties, they relate to form and procedure rather than to substance. So that it could rarely happen that a shifting from one to the other would work prejudicial surprise. But if the parties have not been previously warned by the pleadings that such shifting might
178 take place, and if it should be made to appear that it would be a surprise and operate to cut off a claim or defense which could otherwise have been made, the court would either not allow it, or allow it upon such terms as would prevent prejudice.

In Missouri &c. R. Co. v. Wulf, 226 U. S. 570, plaintiff brought action in her individual capacity under the state law for damages for the death of her son. Defendant alleged that, at the time of his injury and death, deceased was employed and defendant engaged in interstate commerce. Thereafter, plaintiff was appointed administratrix of her son's estate, and was allowed to amend her petition by making herself a party plaintiff, as administratrix, and by alleging a cause of action both under the state and federal law. She recovered under the federal law. There as here the contention was made that, by the amendment, the plaintff was allowed to substitute a new and entirely different cause of action. But the court overruled that contention, and held that the change was in form rather than in substance and it was not equivalent to the commencement of a new

action, so as to render it subject to the two years' limitation prescribed by the federal act. The court said: "It introduced no new or different cause of action, nor did it set up any different state of facts as the ground of action, and therefore it related back to the beginning of the suit."

The amendment allowed in the case at bar was clearly within the power and discretion of the court. Such an amendment may be allowed even during the trial, when it does not so materially change the claim or defense as to result in prejudice to the adverse party. Shelton v. Ry. 86 S. C. 98; Birt v. Ry. 87 S. C. 239; Hewlett v. R. Co. 93 S. C. 76. Where such amendments are asked for during the trial, if the opposite party would be misled or surprised thereby to his prejudice, it is incumbent upon him to make the fact
179 appear by affidavit or otherwise, to the satisfaction of the court; and, if that is done, the court would either refuse the amendment, or, granting it, would continue the hearing, or impose such other terms and conditions as it might deem necessary to prevent prejudice. Shelton v. Ry. supra.

Defendant contends further that the court erred in ordering the trial to proceed after the amendment was allowed, notwithstanding the statement made by its attorney that he was not prepared to meet the issue of the alleged dependency of the widow and children upon deceased. The record shows that defendant resisted the motion to amend chiefly on the assertion of the want of power in the court to grant it, and that its main purpose was to obtain a non-suit. Evidently, the statement of counsel that his only objection to proceeding with the trial was that he was not prepared to meet the issue of dependency did not satisfy the court that he would suffer prejudice on that score; for the court stated, time and again, that if counsel was taken by surprise and was not prepared to proceed with the trial, he would not force him to go on. When counsel first raised the objection that he was not prepared to meet the issue of dependency, plaintiff's attorneys consented to strike out the names of two of the children alleged to be dependent, and then claimed damages only for the widow, an unmarried adult daughter and a minor son, who were all shown by clear and undisputed testimony to have been dependent on deceased. Under all the circumstances, as they appear in the record, appellant has failed to satisfy this court that the trial judge abused his discretion. Though the plaintiff and her children all resided in the city of Columbia, where the case was tried, and had resided here with deceased for more than ten years, and the trial lasted three days, no effort at all appears to have been made by the defendant to procure any testimony rebutting or questioning that of the plaintiff on the issue of dependency, not
180 even by cross-examination of her witnesses. We are impressed that defendant's objection was interposed rather for the purpose of obtaining a technical advantage, and a ground for a new trial, in the event of an adverse verdict, than for the purpose of getting time and opportunity to prepare to meet the alleged new issue, and that, if he had made any showing that he was taken by

surprise to his prejudice and had earnestly asked for time to meet the issue, his request would have been granted.

Certainly, in a case like this, where the defendant must be presumed to know the facts surrounding the employment of deceased better than the plaintiff did, it will not be allowed to withhold the facts, until the trial is in progress, and then spring them on the plaintiff, without having alleged them in its answer, to the discomfiture of the plaintiff. Such procedure is repugnant to any proper conception of a just administration of law.

From what has already been said, there does not appear to be any sound reason why a plaintiff may not set up in his complaint the same cause of action under the state law and also under the federal law, stating it separately, of course, and try it under the law which the proof shows to be applicable. Where the cause of action is so alleged the parties would come to trial prepared to meet the issues which might arise under either aspect of the case. There is no inherent difficulty in this method of procedure, and it will greatly facilitate the trial of such cases and promote the ends of justice. Doubtless in most cases the evidence will clearly settle the question whether the state or federal law is applicable. But, when, under proper allegations of the complaint or answer, and the evidence adduced, there is an issue of fact whether the state or federal law
181 is applicable, the case should be submitted to the jury, under proper instructions as to both aspects of it, so that the jury may render their verdict under the one or the other, as they may find the facts. Zachary v. R. Co. 232 U. S. 248; Howell v. R. Co. 99 S. C. 404. Such is our procedure in actions having such a double aspect that they may be regarded either as actions at common law or under a statute. Lee v. R. Co. 84 S. C. 125. Nor is such procedure obnoxious to any provision of the federal statute. Wabash R. Co. v. Hayes, 224 U. S. 86. In the case last cited, an action was brought under the federal act. But, omitting the allegations which if proved, would have made the federal statute applicable, a cause of action was stated under the state law. The proof failed to show that the injury occurred in interstate commerce, and, at defendant's request the court instructed the jury that the federal statute was not applicable. The case was then submitted to the jury under the state law, and the plaintiff recovered. The federal Supreme Court sustained the judgment, holding that the state "court merely gave effect to a rule of local practice, the application of which was not in anywise in contravention of the federal act."

As there was testimony tending to support some of the specifications of negligence in the complaint, the motion to direct a verdict for defendant was properly refused.

It would be unprofitable to discuss the numerous exceptions in detail. Upon examination of the charge, we find no prejudicial or reversible error therein, or in the refusals to charge. The court might well have charged defendant's fourth and fifth requests that there was no evidence of negligence in that the train which killed deceased consisted of a great number of cars—more than twelve—or in that the engine was backing and pulling the train. Still we

are not satisfied that the refusal was prejudicial. The jury
182 are assumed to be men of common sense, and it is inconceivable that they would have found against defendant merely because the train consisted of any number of cars, or because the engine was backing, if the approach of the train had been signalled by headlight on the engine or in some proper way. There was testimony that the headlight of the engine was not lighted, and that a proper lookout was not kept.

We cannot assent to the view that, under no circumstances, is it the duty of the crew of a switching engine moving in a switching yard to give signals of its approach for the benefit of other employees working in the yard, even though they may know that it is moving about the yard, and be under the duty of looking out for it. But if the law were as contended, the engine in question had not theretofore been moving about the yard. Its regular place of work was in another yard. It had just arrived in the yard where it ran over deceased, and its arrival may not have been expected.

While the undisputed evidence shows that rule U, which forbids the moving of engines or cars backward without lookout, was not applicable to yard service, it was conceded that it was applicable on the main line. Therefore, under the rule, the engine should have had a lookout while on the main line from Columbia to Cayce. As it was a question of fact whether this more extended movement than yard service had been completed, there was no prejudicial error in admitting the rule, for it was for the jury to say whether, under the circumstances, the lookout should have been kept on the backing engine after it entered the yard and until its extended movement was completed.

The questions involved in the other exceptions have been so frequently considered by the court that they require no special consideration.

Judgment affirmed.

183 We concur:

EUGENE B. CARY, *C. J.*
R. C. WATTS, *A. J.*
T. B. FRASER, *A. J.*
GEO. W. GAGE, *A. J.*

184 [Endorsed:] 9093. The State of South Carolina. In the Supreme Court. B. M. Koennecke, &c., Resp'd't, v. S. A. L. R'w'y, App'l't. Opinion by D. E. Hydrick, A. J. We concur: Eugene B. Gary, C. J.; R. C. Watts, A. J.; T. B. Fraser, A. J.; Geo. W. Gage, A. J. Filed Supreme Court of S. C., 4 May, 1915. U. R. Brooks, Clerk.

185 THE STATE OF SOUTH CAROLINA:

In the Supreme Court, Fifth Circuit, Richland County, November Term, 1914.

Mrs. BEAUREGARD MAGDALENE KOENNECKE, as Administratrix of the Estate of J. T. Koennecke, Deceased, Plaintiff-Respondent,

vs.

SEABOARD AIR LINE RAILWAY, Defendant-Appellant.

Order.

Upon reading and filing the annexed petition, it is

Ordered that the remittitur herein be stayed, pending the further order of this Court.

D. E. HYDRICK,
Associate Justice.

May 11, 1915.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of South Carolina:

Your petitioner herein, the defendant-appellant in the above entitled cause, would respectfully represent:

That certain conclusions reached by this honorable Court in its opinion are not justified by the record in the cause, but are
186 directly contrary to such record, because of which, your petitioner has suffered serious prejudice, and in order that this Court may consider petitioner's request that it grant petitioner a rehearing, and revise and change said conclusions, petitioner respectfully prays that the remittitur herein be stayed until this Court may consider the matter. And petitioner further represents that in good faith it intends to apply immediately for a writ of error carrying this case to the Supreme Court of the United States, and represents that it will be much more convenient to do so while the remittitur is in this Court. It, therefore, prays that it be allowed fifteen days from the filing of the order of this Court on this petition, should the same be adverse to this petitioner, in order to apply for such writ of error and perfect its record in connection therewith. Petitioner represents that this delay will not in anywise prejudice respondent, or in anywise postpone the hearing of the cause in the Supreme Court of the United States.

And petitioner specifies the conclusion of this Court which it claims to be contrary to the record, as follows:

First. "The record shows that defendant resisted the motion to amend chiefly on the assertion of the want of power in the Court to grant it, and that its main purpose was to obtain a nonsuit. Evidently, the statement of counsel that his only objection to proceeding with the trial was that he was not prepared to meet the issue of dependency did not satisfy the Court that he would suffer prejudice on that score; for the Court stated, time and again, that if counsel was

taken by surprise and was not prepared to proceed with the trial, he would not force him to go on."

Second. "We are impressed that defendant's objection was interposed rather for the purpose of obtaining a technical advantage, and a ground for a new trial, in the event of an adverse verdict, than for the purpose of getting time and opportunity to prepare to meet the alleged new issue, and that, if he had made any showing that
187 he was taken by surprise to his prejudice and had earnestly asked for time to meet the issue, his request would have been granted."

Third. "Certainly, in a case like this, where the defendant must be presumed to know the facts surrounding the employment of deceased better than the plaintiff did, it will not be allowed to withhold the facts, until the trial is in progress, and then spring them on the plaintiff without having alleged them in its answer, to the discomfiture of the plaintiff. Such procedure is repugnant to any proper conception of a just administration of law."

Petitioner submits that the conclusions first and second above quoted are contrary to the record in the following particulars:

The record does not justify the statement that defendant resisted the motion to amend chiefly on the assertion of the want of power in the Court to grant it and that its main purpose was to obtain a nonsuit. In this connection, however, petitioner represents that if its main purpose had been to obtain a nonsuit, that this was a perfectly ethical and legitimate purpose under the practice in this State, and that the fact of the existence of such purpose or of a failure to accomplish such purpose did not justify the trial Court, after the refusal of a nonsuit, in forcing petitioner on to trial, and is no reason why petitioner should have been forced on to trial over its objection.

There were three questions presented on the motion to amend and to proceed with the trial, considering this in its logical development: First, did the Court have the power to grant the amendment? Second, if this Court did have the power, were the circumstances such as to persuade the judicial conscience that it would be in the furtherance of justice to exercise its judicial discretion in favor of the amendment? And last, but not least, answering the first two ques-
188 tions in the affirmative, were the circumstances such as to justify the Court in forcing the defendant on to trial over its protest?

An examination of the record will show that petitioner's counsel below followed this logical course in presenting petitioner's objections to the procedure in this matter. Beginning at folio 139, plaintiff's attorney submitted his motion and discussed the matter with the Court down to folio 149. Surely, petitioner's counsel was not called upon to interrupt or state petitioner's position before the moving party had finished. Then, at folio 149, petitioner's counsel stated his first objection, to-wit: That the Court did not have the power. It will be noted that immediately (at folio 150), the Court indicated that petitioner's position was correct; surely, then, it was not necessary or proper for petitioner's counsel to say anything further on this first point, although, as a matter of fact, the question was argued

at greater length by petitioner's counsel than appears from the stenographic report. The matter was then discussed at length by plaintiff's attorneys and the Court, and at folio 158, the Court indicated that it had changed its position on the question of power and was ready to proceed to the consideration of the question of discretion at folio 160. It will be observed that petitioner's counsel had said nothing else because he had had no opportunity to do so, and it was not proper for him to do so so long as the Court indicated that his position was correct. But the Court, having indicated that it had changed its mind, at folio 164, but not having expressly so ruled, petitioner's counsel then recalled to the Court the exact question that was then before it, to-wit, the question of power. It was perfectly proper for petitioner's counsel to keep the matter in logical order on the first point, and the fact that he did this can not reasonably be construed as any intimation of a lack of earnestness in his position on the second and third questions involved.

Coming then to the conclusion of this Court that the
189 statement of petitioner's counsel did not satisfy the trial Court that petitioner would suffer prejudice, and the further conclusion of this Court that petitioner's objection below was pressed only for the "purpose of obtaining a technical advantage," and that petitioner's counsel did not earnestly ask time to meet the issue; we would call attention to the fact that after definitely ruling on the question of power, the trial Court came at folio 168 to the consideration of the question of discretion and whether it would force defendant on to trial. This question was first discussed at length between plaintiff's counsel and the Court; and, surely, petitioner's counsel is not to be charged with a lack of earnestness because he did not interrupt this discussion when such an interruption, under the circumstances, would have been an act of rudeness not in conformity with the practice in our trial Courts. It will further be noticed that when petitioner's counsel was given an opportunity to speak on this matter, the trial Judge was considerate enough not to require petitioner's counsel to reduce his statements to the shape of an affidavit (see f. 174), and it was in appreciation of the confidence imposed in him by the trial Court in waiving an affidavit, that the petitioner's counsel used the language: "If your Honor requires me to speak, I will be careful in what I say." He then proceeded: "I can not say I am not familiar with the Federal Employers' Act of Congress. I am not prepared to meet the issue this change of dependency will bring out." Surely, because a trial counsel appreciates the confidence of the Court in waiving an affidavit and shows his appreciation by being careful to limit his language to the exact truth, is no reason why such counsel should be charged with a lack of earnestness in the position taken. Counsel stated flatly and unequivocally: "I am not prepared to meet the issue this change of dependency will bring out," and it is submitted that any further
enlargement or argument upon such a direct, unambiguous
190 and unequivocal statement would not show any more earnestness. This Court will note, however, that immediately upon such statement, the trial Court evidently started to rule in

support of petitioner's position, using the language: "If you can not do it—," but before the trial Court could complete this sentence, plaintiff's counsel interrupted and went into a lengthy discussion of the matter. Then, again, at the first opportunity consistent with a dignified conduct of the trial, petitioner's counsel enlarged upon his position, and if there is any lack of earnestness in the argument of petitioner's counsel, beginning at folio 178, it is because of an inherent lack of ability in such counsel to express himself and not because of any lack of effort on this occasion.

The trial Court then said: "The COURT: I told you if you are not ready to go to trial in this case I will not force you." And petitioner's counsel then answered again, unequivocally and directly: "Mr. LYLES: I am not ready to go to trial. I am not ready to meet the issue of dependency." Since the trial Court had waived the affidavit and relied upon the statement of counsel on this matter, petitioner now most earnestly submits that it is erroneous for this Court to conclude that the trial Court was not persuaded by petitioner's counsel on this point. The Court will note, beginning at folio 180, that plaintiff's attorney then announced that certain of the beneficiaries would be withdrawn, and petitioner's counsel, beginning at folio 182, explained as earnestly and clearly as his ability permitted him to do, the reasons why the procedure suggested by plaintiff's attorney would not remove petitioner's objection.

With this record in this condition, petitioner submits that the trial Court was absolutely without justification in its conclusion, reading as follows:

"The COURT: You had the opportunity to continue the case, and would not avail yourself of it; it is not my fault. I left it in
191 your hands, and you would not avail yourself of it. I was going to continue the case, if you had said, under the circumstances, you could not go to trial." The trial Court had waived an affidavit and stated that it was content with the statement of counsel, and petitioner submits that it would be a serious injustice, under such circumstances, for the position of petitioner to be judged upon any other basis than that required by the trial Court. Petitioner's counsel had stated repeatedly that he was not ready to go to trial. He had stated this clearly and unambiguously more than once. He had met the direct question of the Court more than once with this unambiguous and definite statement and had explained clearly to the Court the reasons why he was not ready, and petitioner submits that it should not be held accountable for the unexplainable change in the conclusion of the trial Court after its counsel had met repeatedly the very tests laid down by the trial Court for a continuance of the case.

Petitioner would also call the Court's attention to the record, beginning at folio 278, where petitioner's counsel again reiterated its position that the trial was proceeding over its objection, stating:

"Mr. LYLES: Before I proceed with my case, your Honor has, over my objection, amended this complaint, and has forced me to trial on the statement I was not ready to meet one of the most material issues in the case. I do not know what sort of pleadings we

have in that complaint. I have been engaged in the trial since the amendment was allowed; I do not know where I stand. To be fair, I do not wish to do anything in any way to amount to a waiver of the position I took. I think it up to your Honor to inform me what my pleadings are. The complaint has been amended, and nothing said about the answer."

It is respectfully submitted that petitioner's counsel, under the rules of dignified procedure that prevail in the trial Courts
192 of this State, could not have done more to impress its position upon the Court without having violated the orderly procedure of the Court.

Upon these considerations, petitioner respectfully submits that its counsel did all things possible for him to do to meet the tests laid down by the trial Judge as to the conditions necessary to be established before petitioner would be entitled to withdraw the case from the jury, and given an opportunity to answer in due and regular course of law, together with a reasonable opportunity to meet the very material issue injected into the case by the amendment.

With reference to the conclusion of the Court third above quoted, petitioner respectfully submits that this case is not one where any presumption as to the superior knowledge of the defendant concerning the facts surrounding the employment of the deceased should be applied, and that the language of the Court third above quoted is not justified by the record in this cause.

It is respectfully submitted that upon the facts of this case, as disclosed by the record before this Court, the question of the character of employment of the deceased was shown to be one not within the superior knowledge of your petitioner, but actually one within the knowledge of the plaintiff.

The testimony concerning which this controversy arises was developed upon the cross-examination of the witness, T. A. Barker, who was sworn in regular course as a witness for plaintiff. Upon examination by plaintiff's attorney, this witness testified as follows:

"Q. You were subpœnaed by the attorneys for the plaintiff?

"A. Yes, sir.

"Q. Have you been in consultation with Mr. Lyles, attorney for the railroad, since you have been here?

"A. No, sir.

"Q. Had you been in consultation with him before that?

"A. No, sir; never met him until on the street; he said he wanted to see me; this morning I saw him.

193 "Q. Did he discuss the facts of this case with you A. No, sir, not specially; spoke to me about the case coming up, said to meet here at 9:30.

"Q. He wanted you here? A. Yes, sir.

"Q. They have you subpœnaed? A. Yes, sir.

"Q. Have you discussed the case with any of their claim agents? A. No, sir; I do not know any of the Seaboard claim agents."

It will be noticed, at folio 140, that plaintiff's counsel states: "Anticipating this might be done during the trial, we have our motion

reduced to writing," and plaintiff's attorneys came into Court with their motion to amend reduced to typewriting.

Petitioner submits that it is a reasonable presumption of fact that this witness was accessible to plaintiff's attorneys before the trial, certainly they had the information before the trial, else how can the fact be explained that they came into Court with their motion reduced to writing? Petitioner does not mean to suggest or to intimate in any way that plaintiff's attorneys in anywise, directly or indirectly, did anything except in entire conformity with all rules of ethics, but upon these facts in the record, it does respectfully submit that the language of the Court third above quoted is inapplicable. Petitioner does respectfully submit that there is no room upon the facts in the record in this case for any presumption that the defendant knew the facts surrounding the employment of the deceased better than the plaintiff did; and there is no room for the suggestion that defendant withheld the facts until the trial was in progress, and thus sprang them on the plaintiff without having alleged them in its answer, to the discomfiture of the plaintiff, and petitioner does further most respectfully submit that the record in this cause does not justify to any extent whatsoever the conclusion or inference that the procedure adopted by it in the development of its
194 case, under the practice recognized and followed in the Courts of this State, was repugnant to any proper conception of a just administration of the law.

Petitioner submits that if the question of any suggested technical advantage is up for consideration under the issues in this cause, although petitioner submits there is not, as the case is to be decided by the rules of procedure laid down in the statutes and rules of Court applicable thereto, that in such a case as made by the record before the Court, there is no reason to infer that the defendant sought to take technical advantage, or to accomplish a miscarriage of justice, and that the language of this Court is an unmerited reflection on defendant and its counsel in the conduct of the trial below. If, however, a discussion of such question is pertinent to the issues involved in the cause, should it be overlooked entirely that plaintiff knew of the facts making an amendment necessary before the trial and had prepared the motion for an amendment, and yet did not present the same until in the midst of the trial? Petitioner does not suggest that in so doing, plaintiff or her counsel did otherwise than endeavor to secure plaintiff's legal rights under the practice applicable, and yet for this, under its conclusions from the record, which petitioner respectfully submits are erroneous, this Court severely criticises defendant.

The Court must bear in mind that the defendant was summoned to answer a definite complaint under the laws of this State, and it did answer the same in due course, according to the rules of practice applicable to such a case. And irrespective of the question whether upon the pleadings, as they then stood, evidence as to the interstate character of the employment of plaintiff was admissible, defendant was under no moral or ethical obligation to set up any defense other than the ones that its counsel saw fit to plead, and

even if the defendant knew this, the failure of the defendant to plead this in its answer subjects it to no reasonable criticism
195 upon ethical or moral grounds; and it is needless to say that the question whether the defendant's counsel made a mistake from a legal standpoint is one to be settled between such counsel and his client, and there is no ground for criticism by the Court. The Mimms case, decided after the trial below, is the first intimation by any Court of final resort that such evidence is not admissible under a general denial, since it is evidence which goes to defeat the cause of action alleged under the State statute by showing that no such cause of action in fact exists, since the cause of action, if any, is under the Federal statute, which is the rule that has prevailed in this State before the Mimms case. Wilson vs. Ry., 51 S. C., 92. Petitioner mentions this in order to show to the Court that even if the record had disclosed an attitude on the part of petitioner's counsel of the character found by the Court, which petitioner submits the record does not show or justify, such an attitude would have been merely an effort to take advantage of a legal defense, according to the legal rules of practice and procedure as they were then supposed to exist, and would not constitute any violation of any ethical rule or any effort to accomplish a maladministration of justice.

Wherefore, your petitioner respectfully prays that the language of the Court quoted above be revised and modified, and if it be necessary to that effect, that a rehearing be granted your petitioner in this regard, and, further, that in order that the Court may consider this petition and reach its proper conclusion thereon, that the remittitur herein be stayed; and further, that in the event of an adverse conclusion of the Court on this petition, that your petitioner be allowed fifteen days beyond the date of the order refusing this petition within which to apply for a writ of error from the
196 Supreme Court of the United States and that the remittitur be stayed for such fifteen days.

And your petitioner will ever pray, etc.

SEABOARD AIR LINE RAILWAY,
Petitioner,
By LYLES & LYLES, *Its Attorneys.*

STATE OF SOUTH CAROLINA,
Richland County:

We hereby certify that each of us are attorneys duly admitted to practice in the Supreme Court of South Carolina; that we and each of us have read the above and foregoing petition, and that there is merit in the grounds therein set forth, and that we are not of counsel nor interested in the result of said cause.

ROBT. W. SHAND.
W. T. AYCOCK.

197 THE STATE OF SOUTH CAROLINA:

In the Supreme Court, Fifth Circuit Richland County, November Term, 1914.

MRS. BEAUREGARD MAGDELENE KOENNECKE, as Administratrix of the Estate of J. T. Koennecke, Deceased, Plaintiff-Respondent,
vs.
SEABOARD AIR LINE RAILWAY, Defendant-Appellant.

Order.

The court regrets that counsel for appellant think that the language of the opinion is an implied criticism of their conduct of the defense. While we do not think it is susceptible of such an inference, lest any one may think so, it gives us pleasure to say that it was not so intended. Saying that counsel sought to obtain a technical advantage to the discomfiture of plaintiff by no means warrants the inference that it was unethical to do so, or even that it was improper. The petition for rehearing is therefore dismissed. But the remittitur will be stayed, until the further order of the court, to allow counsel to apply for a writ of error.

EUGENE B. GARY,
Chief Justice.
D. E. HYDRICK, *A. J.*
R. C. WATTS, *A. J.*
T. B. FRASER, *A. J.*
GEO. W. GAGE, *A. J.*

198 [Endorsed:] 9093. The State of South Carolina. In the Supreme Court, 5- Circuit, Richland County. Mrs. B. M. Koennecke, &c., Resp'd't v. S. A. L. R'w'y, Appel't. Order. Filed Supreme Court of S. C., 18 May, 1915. U. R. Brooks Clerk.

199 THE STATE OF SOUTH CAROLINA:

In the Supreme Court.

BEAUREGARD MAGDALENE KOENNECKE, Administratrix of the Estate of J. T. Koennecke, Deceased, Plaintiff-Respondent,
vs.
SEABOARD AIR LINE RAILWAY, Defendant-Appellant.

Petition for Writ of Error.

Seaboard Air Line Railway, the above named defendant-appellant, respectfully shows that on the fourth day of May, 1915, the Supreme Court of South Carolina, which is the highest Court in the State in which a decision in the action referred to herein could be had, rendered a judgment against your petitioner in a certain action in which Beauregard Magdalene Koennecke, as administratrix of

the estate of J. T. Koennecke, deceased, was plaintiff, and your petitioner, Seaboard Air Line Railway, was defendant.

In said action, certain rights, privileges and immunities were duly and specially set up and claimed by your petitioner under the Constitution and under a statute of the United States, and the decision of the Supreme Court of South Carolina was against the rights, privileges and immunities so set up and claimed, all of which will more fully and in more detail appear from the assignment of errors filed herewith.

Wherefore, and inasmuch as your petitioner feels aggrieved by the final decision of the Supreme Court of South Carolina in rendering the judgment against it in this action, it respectfully prays
200 that a writ of error may issue from the Supreme Court of the United States to the Supreme Court of South Carolina for the correcting of the errors complained of; that an order may be entered fixing the amount of the supersedeas bond herein; that a duly authenticated transcript of the record of the proceedings herein in said Supreme Court of South Carolina be sent to the Supreme Court of the United States; and that the decision and judgment of the Supreme Court of South Carolina herein may be reversed and annulled.

J. B. S. LYLES,
Attorney for Seaboard Air Line Railway.

STATE OF SOUTH CAROLINA:

Supreme Court.

Let the writ of error above prayed for issue upon the execution of a bond by Seaboard Air Line Railway, payable to Beauregard Magdalene Koennecke, as administratrix of the estate of J. T. Koennecke, deceased, in the sum of thirty thousand dollars, such bond, when approved, to act as a supersedeas.

EUGENE B. GARY,
Chief Justice of the Supreme Court of South Carolina.

May 31, 1915.

201 STATE OF SOUTH CAROLINA:

In the Supreme Court.

Mrs. BEAUREGARD MAGDALENE KOENNECKE, as Administratrix of the Estate of J. T. Koennecke, Deceased, Plaintiff-Respondent,
vs.
SEABOARD AIR LINE RAILWAY, Defendant-Appellant.

Assignment of Errors and Prayer for Reversal.

Now comes Seaboard Air Line Railway, the above named defendant-appellant, and files herewith its petition for a writ of error and says that there are errors in the record and proceedings of the above

entitled cause, and for the purpose of having the same reviewed in the Supreme Court of the United States, makes the following assignment:

This was a civil action commenced on the 29th day of July, 1913, by the plaintiff, Mrs. Beauregard Magdalene Koennecke, as administratrix of the estate of J. T. Koennecke, deceased, for the benefit of herself (the widow) and four children, alleged to have been dependent upon deceased for support, to recover damages for the death of said intestate alleged to have been caused by the negligent, wanton, willful and reckless acts of the defendant on the 13th day of June, 1913, while the deceased was in the employ of the defendant as switchman in its switching yards at Cayce, Lexington County, State of South Carolina. The complaint alleges a cause of action under Sections 3955-3958 of the Code of South Carolina, 1912, Volume I, commonly know as the Lord Campbell's Act of South Caro-

201½ lina. The complaint contains no allegation that, at the time he was killed, deceased was employed in interstate commerce, or that defendant was engaged in such commerce; nor does it allege any facts from which, by reasonable intendment, such employment or engagement can be inferred.

The complaint specifies the acts of negligence and willfulness on the part of the defendant as follows:

a. In having the yards improperly lighted, and the walkways therein in improper condition.

b. In that the train, which ran over intestate, consisted of an engine and a great number of box cars amounting to more than twelve.

c. In that the engine, which ran over intestate, was backing with the tender in front, pulling the box cars behind.

d. In that no lookout was kept by the agents of defendant on the engine which ran over plaintiff's intestate.

e. In failing to have an employee on the rear of the engine and in failing to give proper warnings or signals of its approach.

The answer of defendant was duly filed and served to the complaint under the Lord Campbell's Act of South Carolina, and alleges no facts which directly, or by reasonable intendment, bring the case under the Federal Employers' Liability Act. The answer admits the corporate capacity of defendant and the ownership of the switching yards, etc. at Cayce; admits that Koennecke was employed as switchman at the time he came to his death by being run over by a train of defendant, but denies the other allegations of the complaint. The answer further sets up the affirmative defenses of contributory negligence and assumption of risks.

202 The cause came on for trial on these pleadings in the Court of Common Pleas for Richland County on the 20th day of May, 1914. Upon the cross-examination of one of plaintiff's witnesses, plaintiff contended certain testimony was brought out, without objection, proving that intestate was employed and defendant was engaged in interstate commerce at the time of intestate's death, and plaintiff thereupon moved to amend her complaint by alleging such facts. The amendment was objected to by defendant upon the ground that the Court had no power to allow such amendment at

such time, and upon the further ground that the circumstances were not such as to justify the exercise of the discretion of the Court in favor of such amendment, even if it had the power. Both objections were overruled and the trial was ordered to proceed, contrary to defendant's further and repeated objections and prayer for an opportunity to answer and prepare to meet the amended complaint.

Upon the conclusion of all of the testimony, defendant moved for the direction of a verdict in its favor upon the ground that the entire testimony did not admit of the inference that plaintiff's intestate was employed in interstate commerce at the time of his injury and death, and upon the ground that the entire evidence did not admit of the inference that the defendant had been guilty of negligence in the particulars alleged in the complaint, and upon the further ground that the only inference to be drawn from the testimony was that intestate assumed the risks of the dangers and defects causing his death. The motion was overruled by the Circuit Court, which thereupon submitted the case to the jury, but in so doing, denied certain instructions requested by defendant construing the Federal Act and specifying the duties owed by the employer to the employee thereunder. The jury rendered a verdict in favor
203 of the widow for twelve thousand five hundred dollars; in favor of the alleged dependent daughter for seven thousand dollars, and in favor of the alleged dependent son for three thousand dollars; the plaintiff having in the meantime withdrawn the other two beneficiaries from the case, an alleged dependent son and daughter, respectively.

Thereupon, the defendant duly made a motion for a new trial upon the minutes, repeating the legal grounds upon which its motion for the direction of a verdict was made. This was refused. Thereupon, defendant appealed from said judgment to the Supreme Court of South Carolina, and on May 4th, 1915, said Supreme Court filed its judgment affirming the judgment of the Circuit Court.

Seaboard Air Line Railway, defendant-appellant, respectfully assigns as errors in the record and proceedings in this cause in the Supreme Court of South Carolina, the following:

The Supreme Court of South Carolina erred in the construction and application to the facts in this case of the Federal Employers' Liability Act, a Statute of the United States, approved on the 22nd day of April, 1908, and the Act amendatory thereto, approved on the 5th day of April, 1910. That by these errors, the Supreme Court of South Carolina decided against certain titles, rights, privileges and immunities claimed under said statute, which were duly and specially set up and claimed by the defendant (plaintiff in error) in these proceedings.

The said errors are more particularly set forth as follows:

1. That the Supreme Court of South Carolina erred in affirming the ruling of the Circuit Court, made at the time plaintiff requested permission to amend her complaint, following the examina-
204 tion of the plaintiff's witness, T. A. Barker, that there was evidenece then before the Court tending to show that plaintiff's intestate was engaged in interstate commerce at the time of

his injury and death, and erred in affirming the ruling of the trial Court permitting the amendment of the complaint in this respect to conform said complaint to the evidence adduced. These were defendant's exceptions 1*c* and 2.

2. That the Supreme Court of South Carolina erred in affirming the ruling and order of the Circuit Court in forcing defendant to immediately proceed with the trial under the amended complaint over defendant's objection and prayer for an opportunity to answer and prepare to meet such amended complaint, and erred in overruling defendant's contention that by such procedure, defendant was deprived of its property without due process of law and denied the equal protection of the laws, in violation of Section I of the Fourteenth Amendment to the Constitution of the United States. These were defendant's exceptions 4*a*, *b* and *c*, 5 and 6.

3. That the Supreme Court of South Carolina erred in holding and deciding that there was evidence that plaintiff's intestate was employed in interstate commerce at the time of his injury and death, within the meaning of said Federal Act, and erred in affirming the ruling and judgment of the Circuit Court in refusing to direct a verdict in favor of defendant (plaintiff in error) upon the grounds:

"2. Because from the entire evidence the inference cannot be drawn that plaintiff's intestate was employed in interstate commerce at the time he received his injuries resulting in death.

"3. Because plaintiff has failed to sustain the burden of proof resting upon her, by adducing evidence, from which the reasonable inference can be drawn that plaintiff's intestate was employed in interstate commerce at the time he received the injuries re-
205 sulting in death":

when said Supreme Court of South Carolina should have reversed said ruling and judgment of said Circuit Court and itself ordered a verdict in defendant's (plaintiff in error's) favor npon these grounds. These were defendant's exceptions 7 and 8.

4. That the Supreme Court of South Carolina erred in holding and deciding that there was evidence of negligence on the part of defendant (plaintiff in error), its agents, servants or employees, proximately causing or contributing to the death of plaintiff's intestate, within the meaning of said Federal Act, and erred in affirming the ruling and judgment of the Circuit Court in refusing to direct a verdict in favor of defendant (plaintiff in error) upon the grounds:

"4. Because the entire evidence does not admit of the inference that the defendant was guilty of negligence in any of the particulars alleged in the complaint which proximately caused or resulted in the injuries and death of plaintiff's intestate.

"5. Because the only reasonable inference which can be drawn from the entire evidence is that the injuries and death of plaintiff's intestate were proximately caused by his own negligence and not by any negligence on the part of the defendant in the particulars alleged in the complaint":

when said Supreme Court of South Carolina should have reversed said ruling and judgment of the Circuit Court and itself ordered a verdict in defendant's (plaintiff in error's) favor upon these grounds. These were defendant's exceptions 9 and 10.

5. That the Supreme Court of South Carolina erred in affirming the ruling of the Circuit Court which denied to defendant
206 (plaintiff in error) a new trial upon the minutes, upon the following ground:

"1. Because his Honor having charged the defendant's third request, as follows:

" '3. There is no evidence to show that the failure of the defendant to have the tracks and the walkways between the tracks in a safe and proper condition was a proximate cause of plaintiff's intestate's injuries and death and the jury cannot consider this allegation of the complaint,'

"And this having eliminated from the consideration of the jury the violation of any duty on the part of the defendant to plaintiff's intestate in having the tracks and walkways, etc., in an improper and unsafe condition, there was no evidence of any other violation of duty or negligence on the part of the defendant proximately resulting in injury and death to plaintiff's intestate, and the verdict must be set aside as a matter of law."

This was defendant's exception 21.

6. That the Supreme Court of South Carolina erred in holding and deciding that the entire evidence admitted of any other reasonable inference than that plaintiff's intestate assumed the risks of the dangers and defects causing his injury and death, within the meaning of said Federal Act, and erred in affirming the ruling and judgment of the Circuit Court in refusing to direct a verdict in favor of defendant (plaintiff in error) upon the ground:

"6. Because the only inference to be drawn from the entire evidence is that plaintiff's intestate assumed the risks of the dangers and defects which caused his injuries resulting in death":

when said Supreme Court of South Carolina should have re-
207 versed said ruling and judgment of the Circuit Court, and itself ordered a judgment in defendant's (plaintiff in error's) favor upon this ground. This was defendant's exception 11.

7. That the Supreme Court of South Carolina erred in affirming the ruling of the trial Court in refusing the defendant's second request to charge, which was as follows:

"2. There is no evidence tending to sustain the allegation that there were no lights in the yard, adequate for the proper protection of plaintiff's intestate in the performance of his duties, or tending to show that the negligence of the defendant in this particular was a proximate cause of the injuries and death of plaintiff's intestate, and the jury cannot consider this allegation of the complaint."

This was defendant's exception 14.

8. That the Supreme Court of South Carolina erred in holding that while the trial Court erred in refusing to charge defendant's requests 4 and 5, which were as follows:

"4. There is no evidence to support the allegation that the de-

fendant was negligent in that the train which ran over and killed plaintiff's intestate consisted of an engine and a great number of box cars, to the amount of more than twelve, or that such negligence was a proximate cause of the injuries and death of plaintiff's intestate, and the jury cannot consider this allegation of the complaint.

"5. There is no evidence of negligence on the part of the defendant in that the engine was backing, with the tender in front pulling the box cars behind, and no evidence that this was a proximate cause of the injuries and death of plaintiff's intestate, and the jury cannot consider this allegation of the complaint.",

208 that such failure was not prejudicial and said Supreme Court erred in ruling that it was inconceivable that the jury found against the defendant upon either of these grounds. These were defendant's exceptions 15 and 16.

9. That the Supreme Court of South Carolina erred in affirming the ruling of the Circuit Court in refusing defendant's sixth and seventh requests to charge, which were as follows:

"6. There is no evidence that the defendant was negligent in that no lookout was kept by the agents of the defendant on the engine which ran over plaintiff's intestate and no evidence that such negligence was a proximate cause of the injuries and death of plaintiff's intestate, and the jury cannot consider this allegation of the complaint.

"7. There is no evidence of negligence on the part of the defendant in failing to have an employee on the rear of the engine, which it is claimed ran over plaintiff's intestate, since the entire evidence shows that this was a switch engine, in yard service at the time and not moving on the main line, and there is no evidence that such negligence was a proximate cause of the injuries and death of plaintiff's intestate, and the jury cannot consider such allegations of the complaint."

These were defendant's exceptions 17 and 18.

10. That the Supreme Court of South Carolina erred in affirming the action of the Circuit Court in refusing the defendant's eighth request to charge, which was as follows:

"8. It is not the duty of the crew of a switching engine moving through switching yards to ring the bell or give other signals for the benefit of an employee whose duties require him to work in
209 the yards and who knows or by the exercise of ordinary care could know that switching engines were constantly moving through the yards, and who should reasonably anticipate and expect the engine in question, it being the duty of such employee to be on the lookout for the switching engine and not the duty of the crew of the switching engine to be on the lookout for the employee.",

and said Supreme Court further erred in holding and ruling that said request was not applicable to the issues made by the pleadings and testimony in the cause. This was defendant's exception 20.

11. That the Supreme Court of South Carolina erred in affirming the ruling of the trial Court, which was made upon the motion of the defendant for the direction of a verdict in the following language:

"The COURT: You need not point out all the acts of negligence. If you prove any one act of negligence will be sufficient to sustain it. They say Rule U does not apply to train running from Columbia to Cayce, and stopping on that track and unhitching engine, and getting other cars and bringing them back. That is one act of negligence the jury will have to decide. They say it does not apply to the movement in the yard, movement from Columbia to Cayce. It was their business under the rule of the company to have a man on the back of the train when they started from Columbia, and it was his business to be there when they arrived at Cayce, he had no right to jump off and leave the car without guarding against running over people."

And said Supreme Court erred in affirming the ruling of the trial Court which admitted in evidence over the objection of defendant, on the examination of plaintiff's witness, Barker, and on the cross-examination of defendant's witness, Thornton, certain rules,
210 and more particularly, Rule U, found in the so-called time table of the defendant Company, such rule being as follows:

"Cars will not be moved in front of engine, or engine moved backward, unless there is an employee on the front of the moving car, or on the rear of the engine, to keep a lookout, in the direction the movement is being made, to avoid striking persons or obstructions on track. Enginemen, as well as conductors, will be held responsible for violation of this rule.",

and said Supreme Court of South Carolina erred in holding, with reference to said Rule U, that it was a question of fact whether said rule was applicable to the engine and cars which ran over plaintiff's intestate, when the entire evidence was that such engine and cars were switching in the yard off of the main line, and further, when the entire evidence did not admit of the inference that defendant was then under a duty, either under said rule or under the law of the case, to have a man on the back of the train or engine which killed plaintiff's intestate, to look out for or warn plaintiff's intestate, an employee in the switching yard. These were defendant's exceptions 24 and 25.

Wherefore, for these and other manifest errors appearing in the record, the said Seaboard Air Line Railway, defendant, (Plaintiff in error) prays that this judgment of the Supreme Court of South Carolina, filed May 4th, 1915, be reversed, set aside and held for naught, and that a judgment be rendered for this defendant (plaintiff in error) granting its rights under the Constitution and Statutes of the United States, and the defendant (plaintiff in error) also prays for judgment for costs in its favor.

J. B. S. LYLES,
Attorney for Seaboard Air Line Railway,
Defendant (Plaintiff in Error).

211 [Endorsed:] State of South Carolina, in the Supreme Court. Beauregard Magdalene Koennecke, as administratrix, Plaintiff-Respondent, vs. Seaboard Air Line Railway, Defendant-Appellant. Petition for Writ of Error, Order of Allowance, Assign-

ment of Errors and Prayer for Reversal. J. B. S. Lyles, Attorney for S. A. L. Ry. Filed Supreme Court of South Carolina, May 31, 1915. U. R. Brooks, Clerk South Carolina Supreme Court.

212 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Justices of the Supreme Court of the State of South Carolina, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court, before you, or some of you, being the highest Court of law or equity of the State in which a decision could be had in the said suit between Beauregard Magdalene Koennecke, as administratrix of the estate of J. T. Koennecke, deceased, and Seaboard Air Line Railway, a corporation, wherein was drawn in question the construction of a clause of the Constitution, and a statute of the United States, and the decision was against the title, right, privilege or immunity specially set up or claimed under such clause of the said Constitution and the said statute; a manifest error hath happened, to the great damage of the said Seaboard Air Line Railway, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, D. C., within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice
213 of the Supreme Court of the United States, the 31 day of May, in the year of our Lord, one thousand nine hundred and fifteen.

[Seal United States District Court, Eastern District So. Ca.]

RICH'D W. HUTSON,
Clerk District Court of the United States,
Eastern District of South Carolina.

Allowed:
EUGENE B. GARY,
Chief Justice of the Supreme Court of South Carolina.

214 [Endorsed:] State of South Carolina, in the Supreme Court. Beauregard Magdalene Koennecke, as Administratrix, Plaintiff-Respondent, vs. Seaboard Air Line Railway, Defendant-Appellant. Writ of error. J. B. S. Lyles, Attorney for Seaboard Air Line Railway. Filed Supreme Court South Carolina, May 31, 1915. U. R. Brooks, Clerk Supreme Court South Carolina.

215 The Supreme Court of South Carolina.

SEABOARD AIR LINE RAILWAY, Plaintiff in Error,

vs.

BEAUREGARD MAGDALENE KOENNECKE, as Administratrix of the Estate of J. T. Koennecke, Deceased, Defendant in Error.

Bond.

Know All Men By These Presents, That we, Seaboard Air Line Railway, a consolidated corporation of the States of Virginia, North Carolina and South Carolina, the principal offices of which is in the City of Portsmouth, in the State of Virginia, as principal, and Fidelity & Deposit Company of Maryland, as surety, are held and firmly bound unto Beauregard Magdalene Koennecke, as administratrix of the estate of J. T. Koennecke, deceased, in the full and just sum of thirty thousand dollars ($30,000), for the payment of which sum well and truly to be made, we hereby jointly and severally bind ourselves and each of our successors and assigns firmly by these presents.

Sealed with our Seals, and dated this twenty-first day of May, A. D., 1915.

Whereas, lately at a hearing had before the Supreme Court of South Carolina, in a suit pending in said Court, between the said Beauregard Magdalene Koennecke, as administratrix of the estate of J. T. Koennecke, deceased, as plaintiff-respondent, and said Seaboard Air Line Railway, as defendant-appellant, a final judgment was rendered against said Seaboard Air Line Railway, and
216 said Seaboard Air Line Railway seeks to prosecute its writ of error to the Supreme Court of the United States to reverse said final judgment:

Now, therefore, the condition of this obligation is such that if the Seaboard Air Line Railway, as plaintiff in error, shall prosecute its said writ of error and answer all costs and damages that may be adjudged against it, if it shall fail to make good its plea, then this obligation shall be void; otherwise, to remain in full force and effect.

[SEAL.] SEABOARD AIR LINE RAILWAY,
By W. J. HARAHAN.

Attest: ROB'T L. NETTLES.

Witnesses as to S. A. L. Ry.:
C. V. FLEMING.
WM. A. BRAMBERRY.

Witnesses as to —.
—— ——.
—— ——.

FIDELITY & DEPOSIT COMPANY OF MARYLAND, [SEAL.]
By R. BEVERLY SLOAN, *Attorney in Fact.*

Attest: JAMES A. CATHCART,
General Agent.

Witnesses as to Fidelity & Deposit Company of Maryland.
MAYO REES.
JOHN T. SLOAN.

217 STATE OF VIRGINIA,
City of Norfolk:

Personally appeared C. V. Fleming, before me, a Commissioner of Deeds for the State of South Carolina, in the State of Virginia, and made oath that he was present and saw W. J. Harahan, President, sign, affix the corporate seal of Seaboard Air Line Railway, and as the act and deed of said corporation, deliver the within written instrument; and that he with Wm. A. Bramberry, witnessed the execution thereof.

C. V. FLEMING.

Subscribed and sworn to before me this 21st day of May, A. D. 1915.

[SEAL.] S. B. PARKINSON,
Commissioner of Deeds for the State of South Carolina in the State of Virginia.

My Commission expires at will of Gov.

STATE OF SOUTH CAROLINA,
Richland County:

Personally appears John T. Sloan, who, on oath, says that he saw Fidelity & Deposit Company of Maryland, by R. Beverly Sloan, its attorney in fact, and James A. Cathcart, General Agent, sign, seal, and, as its act and deed, deliver the above and foregoing instrument for the uses and purposes therein mentioned, and that he, with Mayo Rees, witnessed the execution thereof.

JOHN T. SLOAN.

Sworn to and subscribed before me, this 27th day of May, A. D., 1915.

[SEAL.] JOS. L. NETTLES, [L. S.]
Notary Public for South Carolina.

Bond approved and to act as supersedeas:

EUGENE B. GARY,
Chief Justice Supreme Court South Carolina.

May —, 1915.

218 [Endorsed:] State of South Carolina, in the Supreme Court. Beuregard Magdelene Koennecke, as administratrix, Plaintiff-Respondent, vs. Seaboard Air Line Railway, Defendant-Appellant. Bond. Filed Supreme Court South Carolina May 31, 1915. U. R. Brooks, Clerk South Carolina Supreme Court.

219 *Citation.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Beauregard Magdalene Koennecke, as Administratrix of the Estate of J. T. Koennecke, Deceased, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of South Carolina, wherein Seaboard Air Line Railway is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Eugene B. Gary, Chief Justice of the Supreme Court of South Carolina, this the 31 day of May, 1915.

[Seal Supreme Court of South Carolina.]

EUGENE B. GARY,
Chief Justice of the Supreme Court of the State of South Carolina.

Attest:
U. R. BROOKS,
Clerk of the Supreme Court of the State of South Carolina.

220 STATE OF SOUTH CAROLINA,
Richland County:

I, the undersigned attorney of record for the defendant in error in the above entitled cause, hereby acknowledge due service of the above citation, and enter an appearance for said defendant in error in the Supreme Court of the United States, this 31st day of May, 1915.

FRANK G. TOMPKINS,
Attorney of Record for Beauregard Magdalene Koennecke, Administratrix of the Estate of J. T. Koennecke, Deceased.

221 [Endorsed:] Supreme Court of the United States. Beauregard Magdalene Koennecke, as administratrix, Defendant in Error, vs. Seaboard Air Line Railway, Plaintiff in Error. Citation. J. B. S. Lyles, Attorney for Seaboard Air Line Railway. Filed Supreme Court South Carolina, May 31, 1915. U. R. Brooks, Clerk Supreme Court South Carolina.

222 SUPREME COURT OF THE STATE OF SOUTH CAROLINA, *ss:*

Certificate of Lodgment.

I, U. R. Brooks, Clerk of the Supreme Court of South Carolina, do hereby certify that there was lodged with me, as such Clerk, on May 31, 1915, in the matter of Beauregard Magdalene Koennecke, as administratrix of the estate of J. T. Koennecke, deceased, against Seaboard Air Line Railway, a corporation:

1. The original bond, of which a copy is herein set forth.

2. Two copies of the writ of error herein set forth—one for plaintiff and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at my office in Columbia, South Carolina, this May 31, 1915.

[Seal Supreme Court of South Carolina.]

U. R. BROOKS,
Clerk Supreme Court South Carolina.

223 SUPREME COURT,
State of South Carolina, ss:

Authentication of Record.

I, U. R. Brooks, Clerk of said Court, do hereby certify that the foregoing pages numbered from 1 to 221, inclusive, are a true, full and complete transcript of the record and proceedings in the case of Beauregard Magdalene Koennecke, as administratrix of the estate of J. T. Koennecke, deceased, plaintiff-respondent, vs. Seaboard Air Line Railway, defendant-appellant; and also, of the opinion and judgment of the Court rendered therein, and also, of the petition for a re-hearing and the order of the Court thereon, as the same now appear on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office in Columbia, South Carolina, this May 31, 1915.

[Seal Supreme Court of South Carolina.]

U. R. BROOKS,
Clerk Supreme Court South Carolina.

224 UNITED STATES OF AMERICA,
Supreme Court of South Carolina, ss:

BEAUREGARD MAGDALENE KOENNECKE, as Administratrix of the Estate of J. T. Koennecke, Deceased, Plaintiff-Respondent,
vs.
SEABOARD AIR LINE RAILWAY, Defendant-Appellant.

Return to Writ.

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, together with all things concerning same.

In witness whereof, I hereunto subscribe my name and affix the seal of the said Supreme Court of South Carolina, in the City of Columbia, this May 31, 1915.

[Seal Supreme Court of South Carolina.]

U. R. BROOKS,
Clerk Supreme Court South Carolina.

Costs of Suit.

Plaintiff's costs $—, paid by Seaboard Air Line Railway.
Defendant's costs $277.40, paid by Seaboard Air Line Railway.
Costs of transcript $65.00, paid by Seaboard Air Line Railway.

U. R. BROOKS,
Clerk Supreme Court South Carolina.

225 THE STATE OF SOUTH CAROLINA:

In the Supreme Court.

BEAUREGARD MAGDALENE KOENNECKE, as Administratrix of the Estate of J. T. Koennecke, Deceased, Plaintiff-Respondent,
vs.
SEABOARD AIR LINE RAILWAY, Defendant-Appellant.

Præcipe.

To U. R. Brooks, Clerk Supreme Court of the State of South Carolina.

SIR: The plaintiff in error, defendant-appellant above entitled, requests that you incorporate into the transcript of the record which you are to send to the Supreme Court of the United States, in accordance with the directions contained in the writ of error in the above stated cause, now on file in your office, the following:

The entire printed case for appeal, commencing at the beginning on page 1, down through the stipulation on page 175.

J. B. S. LYLES,
Attorney for Seaboard Air Line Railway,
Plaintiff in Error.

226 STATE OF SOUTH CAROLINA,
Richland County:

I, attorney of record for Beauregard Magdalene Koennecke, a administratrix of the estate of J. T. Koennecke, deceased, defend ant in error, hereby acknowledge service of the above and fore going præcipe.

FRANK G. TOMPKINS,
Attorneys for Beauregard Magdalene Koennecke, Administratrix, etc., Defendant in Error.

June 1, 1915.

[Endorsed:] Supreme Court of United States, October Term 1914. Transcript of Record. Seaboard Air Line Railway, Plain tiff in Error, vs. Beauregard Magdalene Koennecke, administratri of the estate of J. T. Koennecke, deceased, Defendant in Error. I Error to the Supreme Court of South Carolina. Filed Supreme Court of South Carolina, May 31, 1915. U. R. Brooks, Clerk.

Endorsed on cover: File No. 24,770. South Carolina Supreme Court. Term No. 491. Seaboard Air Line Railway, plaintiff in error, vs. Beauregard Magdalene Koennecke, as administratrix o the estate of J. T. Koennecke, deceased. Filed June 11th, 1915 File No. 24,770.

Supreme Court, U. S.
FILED
NOV 20 1915
JAMES D. MAHER
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1915.

No. 491.

SEABOARD AIR LINE RAILWAY, PLAINTIFF IN ERROR,

vs.

MRS. BEAUREGARD MAGDALENE KOENNECKE, AS ADMINISTRATRIX OF THE ESTATE OF J. T. KOENNECKE, DECEASED, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

BRIEF FOR PLAINTIFF IN ERROR ON THE MERITS.

J. E. H. LYLES,
Attorney for Plaintiff in Error.

Supreme Court of the United States

OCTOBER TERM, 1915.

No. 491.

SEABOARD AIR LINE RAILWAY, PLAINTIFF IN ERROR,

vs.

MRS. BEAUREGARD MAGDALENE KOENNECKE, AS ADMINISTRATRIX OF THE ESTATE OF J. T. KOENNECKE, DECEASED, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

BRIEF FOR PLAINTIFF IN ERROR ON THE MERITS.

J. B. S. LYLES,
Attorney for Plaintiff in Error.

The plaintiff in error adopts and will rely upon its brief filed in opposition to the motion to dismiss or affirm as its brief in this cause on the hearing on the merits on the Summary Docket. Plaintiff in error feels that any further discussion of the facts or points of law beyond that contained in the brief referred to would be mere repetition.

In connection, however, with Specification IV, beginning at page 26 of the brief referred to, plaintiff in error respectfully calls the attention of the Court to its decision in the case of Henry L. Coe against Armour Fertilizer Works, decided May 3rd, 1915, and reported in U. S. Adv. Ops., 1914, page 625, A. S. 13. This case is referred to as authority for the proposition that plaintiff in error was deprived of its property without

due process of law in being forced to proceed with the trial under the amended complaint against its protest and over its objection, and without notice or opportunity to prepare to meet the new case: that in this manner, plaintiff in error was denied notice, opportunity to be heard and a day in Court after notice, within the provisions of the Fourteenth Amendment.

Respectfully submitted,

J. B. S. LYLES,
Attorney for Plaintiff in Error.

Service of this brief acknowledged, this 12th day of November, 1915.

FRANK G. TOMPKINS,
C. S. MONTEITH,
Attorneys for Defendant in Error.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917

No. 491

SEABOARD AIR LINE RAILWAY, PLAINTIFF IN ERROR,

vs.

MRS. SEABOARD AIR LINE RAILWAY COMPANY,
An Administratrix of the Estate of [illegible],
Deceased, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF [illegible].

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

[illegible]

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915

No. 491.

SEABOARD AIR LINE RAILWAY, PLAINTIFF IN ERROR,

vs.

MRS. BEAUREGARD MAGDALENE KOENNECKE, As Administratrix of the Estate of J. T. Koennecke, Deceased, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

BRIEF FOR PLAINTIFF IN ERROR, OPPOSING MOTION TO DISMISS OR AFFIRM.

J. B. S. LYLES, *Attorney for Plaintiff in Error.*

STATEMENT FOR PLAINTIFF IN ERROR.

The writ of error brings up a judgment of the Supreme Court of South Carolina, filed May 4th, 1915, affirming the judgment of the Court of Common Pleas for Richland County, in the sum of twenty-two thousand five hundred dollars ($22,500) and costs, entered on a verdict in favor of the plaintiff below.

ISSUES RAISED BY PLEADINGS AND PROCEDURE.

This was a civil action commenced on the 29th July, 1913, by the plaintiff below, Mrs. Beauregard Magdalene Koennecke, as administratrix of the estate of J. T. Koennecke, deceased, for the benefit of herself (the widow), and four children, alleged to have been dependent upon deceased for support, to recover damages for the death of intestate alleged to have been caused by the negligent, wanton, willful and reckless acts of the defendant on the 13th day of June, 1913, while the deceased was in the employ of the defendant as a switchman in its switching yards at Cayce, Lexington County, State of South Carolina. The complaint, originally served, on which the cause was brought up for trial in the Court of Common Pleas for Richland County, on the 20th day of May, 1914, alleged a cause of action under Sections 3955-3957 of the Code of Laws of South Carolina, 1912, commonly known as the Lord Campbell's Act of South Carolina, which Sections are as follows:

> "Sec. 3955. Civil Actions for Wrongful Acts Causing Death.—Whenever the death of a person shall be caused by the wrongful act, neglect, or default of another, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person or corporation who would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, although the death shall have been caused under such circumstances as make the killing in law a felony.
>
> "Sec. 3956. Beneficiaries of Action for Wrongful Death—Damages Recoverable—Distribution.—Every such action shall be for the benefit of the wife or husband and child, or children, of the person whose

death shall have been so caused; and if there be no such wife, or husband, or child, or children, then for the benefit of the parent or parents; and if there be none such, then for the benefit of the heirs at law or the distributees of the person whose death shall have been caused and shall be brought by or in the name of the executor or administrator of such person; and in every such action the jury may give such damages, including exemplary damages where such wrongful act, neglect, or default was the result of recklessness, wilfulness or malice, as they may think proportioned to the injury resulting from such death to the parties respectively, for whom and for whose benefit such action shall be brought. And the amount so recovered shall be divided among the before mentioned parties, in such shares as they would have been entitled to if the deceased had died intestate and the amount recovered had been personal assets of his or her estate.

"Sec. 3957. Limitation of Actions for Wrongful Death—Liability for Costs.—All such actions must be brought within six years from the death of such person, and the executor or administrator, plaintiff in the action, shall be liable to costs in case there be a verdict for the defendant, or nonsuit or discontinuance, out of the goods, chattels and lands of the testator or intestate, if any."

The complaint contained no allegation that, at the time he was killed, deceased was employed in interstate commerce, or that defendant was engaged in such commerce; nor did it allege any facts from which, by reasonable intendment, such employment or engagement could be inferred.

The complaint specified the acts of negligence and willfulness on the part of the defendant as follows:

a. In having the yards improperly lighted, and the walkways therein in improper condition.

b. In that the train, which ran over intestate, consisted of an engine and a great number of box cars amounting to more than twelve.

c. In that the engine, which ran over intestate, was backing with the tender in front, pulling the box cars behind.

d. In that no lookout was kept by the agents of defendant on the engine which ran over plaintiff's intestate.

e. In failing to have an employee on the rear of the engine and in failing to give proper warnings or signals of its approach. R. pp. 1-3.

The answer of defendant was duly filed and served to the complaint under the Lord Campbell's Act of South Carolina, and alleges no facts which directly, or by reasonable intendment, bring the case under the Federal Employers' Liability Act. The answer admits the corporate capacity of defendant and the ownership of the switching yards, etc., at Cayce; admits that Koennecke was employed as switchman at the time he came to his death by being run over by a train of defendant, but denies the other allegations of the complaint. The answer further sets up the affirmative defense of contributory negligence and assumption of risks. R. pp. 3-4.

The cause came on for trial on these pleadings in the Court of Common Pleas for Richland County on the 20th day of May, 1914. Upon the cross-examination of one of plaintiff's witnesses, plaintiff contended certain testimony was brought out, without objection, proving that intestate was employed and defendant was engaged in interstate commerce at the time of intestate's death, and plaintiff thereupon moved to amend her complaint by alleging such facts. The amendment was objected to by defendant upon the ground that the Court had no power to allow such amendment at such time, and upon the further ground that the circumstances were not such as to justify the exercise of the discretion of the Court in favor of such amendment, even if it had the power. Both objections were overruled and the trial was ordered to

proceed, contrary to defendant's further and repeated objections and prayer for an opportunity to answer and prepare to meet the amended complaint. R. pp. 26-33, 51-53.

Upon the conclusion of all of the testimony, defendant moved for the direction of a verdict in its favor upon the ground that the entire testimony did not admit of the inference that plaintiff's intestate was employed in interstate commerce at the time of his injury and death, and upon the ground that the entire evidence did not admit of the inference that the defendant had been guilty of negligence in the particulars alleged in the complaint, and upon the further ground that the only inference to be drawn from the testimony was that intestate assumed the risks of the dangers and defects causing his death. R. pp. 104-106. The motion was overruled by the Circuit Court, which thereupon submitted the case to the jury, but in so doing, denied certain instructions requested by defendant construing the Federal Act and specifying the duties owed by the employer to the employee thereunder. R. p. 125. The jury rendered a verdict in favor of the widow for twelve thousand five hundred dollars; in favor of the alleged dependent daughter for seven thousand dollars, and in favor of the alleged dependent son for three thousand dollars; the plaintiff having in the meantime withdrawn the other two beneficiaries from the case, an alleged dependent son and daughter, respectively. R. p. 32.

Thereupon, the defendant duly made a motion for a new trial upon the minutes, repeating the legal grounds upon which its motion for the direction of a verdict was made. This was refused. Thereupon, defendant appealed from said judgment to the Supreme Court of South Carolina, and on May 4th, 1915, said Supreme Court filed its judgment affirming the judgment of the Circuit Court. R. pp. 114-115.

STATEMENT OF EVIDENCE.

Deceased had been employed by defendant as a member of a switching crew in the Cayce yards for about seven months before his death. He had started his employment with defendant as night yardmaster, in which capacity he was head man in actual charge of a switching crew, but when killed he was an ordinary switchman. In both capacities he was a member of a night switching crew, actually and actively engaged in switching during this entire time, and always in the very yard where he came to his death. Deceased had been in the employ of the Southern Railway, discharging similar duties for fifteen years before he came to the Seaboard, having been discharged there. (R. pp. 9-10, 17-18, 20, 24, 46, 47-48, 49, 62, 88-91, 102.) Intestate was an active man, in good health, with good hearing and eye-sight (R. p. 48).

The yards at Cayce had been put in use during the summer of 1912. They were completed in January, 1913. They are what may be termed terminal yards where all trains coming in are broken up and all trains going out are made up. All freight trains on this line of the Seaboard terminate there, and, in addition, all cars consigned to and from Columbia and other railroads here are handled there. As a consequence, the switching in the Cayce yards was and is a constant performance, the movement of cars and engines going on during each of the twenty-four hours, ordinarily several switch engines as well as road engines being in service there (R. pp. 8, 69, 73, 77-78, 130).

These Cayce yards consisted of 12 tracks located on the east side of the mainline, which there runs in a generally north and south direction. The mainline, however, around the yards describes a general curve (going south) to the east, and the tracks are located on the concave side of this curve. The track furthest east is what is known as the lead track, both ends of which run into the mainline, and both ends of all of the switching tracks run into this lead track, being located between it and the

mainline. Any engine or train, therefore, to proceed from the mainline to any of the switching tracks, must leave the mainline by such lead track, at either its northern or southern connection, with the mainline, and proceed along such lead track until it comes to the switch track it desires to enter. The switching tracks are numbered from the mainline to lead track, i. e., track number one being the track nearest the mainline.

On the night of June 13, 1913, the deceased was a member of the switching crew with switch engine No. 419. Barker was yardmaster in charge of the crew, deceased and a negro, Brown, were switchmen, and Beecher was engineer. They were engaged in breaking up and making up trains in the Cayce yards (R. pp. 9, 17-18).

Local freight No. 67 from Hamlet, N. C., to Cayce had come in from the north on to track No. 3, and its engine had cut off and gone to the roundhouse, leaving on track No. 3 the cars and caboose it had brought in. The crew of No. 419, including deceased, took the caboose off and carried it to track No. 8, as the first step in making up the local freight to go back to Hamlet, N. C., the next day. There were some "local cars" on track No. 9 to go out on this local freight being made up on track No. 8, and the next duty of the crew of No. 419 was to finish breaking up train No. 67 and finish making up this return local freight on track No. 8, including the putting on it of the "local cars" left on No. 9 (R. pp. 9-10, 17-20, 23, 25-26, 61-62, 70-72, 73-76).

In the meantime, extra freight No. 77 came in from the south on to track No. 3 and found there the cars that came in on No. 67, from which the crew of No. 419 had just taken the caboose. This extra No. 77 stopped south of these cars on track No. 3 with the electric headlight of the engine lighting up these cars and the surroundings to the north (R. pp. 18-19, 81-82).

This extra engine No. 77 was entitled to go on through track No. 3 to a switch to the north where it could switch over and go back south to the roundhouse. Barker, in

charge of No. 419, seeing this, sent deceased and Brown back with the engine to take these cars out of track No. 3 and let engine No. 77 pass on through track No. 3. The engine No. 419 went north on track No. 8 to the switch and backed south into track No. 3 on to these cars. Deceased did not go on the engine, but his duties required him to be at track No. 3 so as to see that his engine No. 419 came back in properly and coupled to these cars. No. 419 backed in track No. 3 and coupled to the cars, deceased and Brown being there.

At that moment switch engine No. 423 came in from Columbia, backing, but pulling its cars behind it. This switch train No. 423 was moving south, but the engine was headed north. No. 423 was scheduled to proceed south into track No. 4 and since No. 423 was there in the lead, No. 419 could not pull out of track No. 3 until No. 423 had cleared the switch. It was then necessary for No. 419 to remain stationary until No. 423 had passed. It was, of course, necessary for extra No. 77 to remain stationary, since it was on track No. 3 south of No. 419. It was then deceased's duty to see that his engine and cars were clear and out of the way of No. 423—since at that time, they were waiting for No. 423 to get by. No. 419 and extra No. 77 remained stationary as No. 423 pulled in. Deceased was last seen standing by the cars attached to his engine, No. 419, between tracks Nos. 3 and 4, as No. 423 pulled in on No. 4 (R. pp. 54-56, 61-62, 65-66). The witness, Barker, last saw intestate at track No. 8, where Barker instructed intestate and Charlie Brown to return to track No. 3, with their engine, No. 419, and get the cars on track No. 3 that had come in on local freight train No. 67. Barker did not actually see that intestate had reached track No. 3 before engine No. 423 came in, but intestate had time to do so and it was his duty to have reached and been there before engine No. 423 came in (R. pp. 10, 17, 18-19, 23, 25-26). The witness, Charlie Brown, testified positively that intestate had reached track No. 3 and

was standing there when engine No. 423 came in (R. pp. 71-72).

No. 423 pulled in and passed No. 419 at a speed of from four to six miles an hour, with its headlight on the rear burning brightly—shining ahead to the south in the direction it was going. The scene was lit up by the electric headlight of extra No. 77, standing to the south and shining to the north, in the direction No. 423 was coming. The engineer of No. 423 was looking ahead over the sloping tank of his switch engine, in the direction he was going. The fireman of No. 423 was down in the tender shoveling coal. Deceased was then charged with the specific duty of waiting for No. 423 to pass and of keeping his train, No. 419, out of the way.

The engineer of No. 423 was looking in the direction his engine was going and could have seen intestate if he had been standing on track No. 4, as engine No. 423 was coming in, at a distance of a car length ahead of his engine, but supposing that intestate stepped from track No. 3 immediately in front of engine No. 423, within thirty-five feet of the engine, it was impossible for the engineer to have seen him (R. pp. 59-60, 76).

The manner in which intestate came in contact with the engine or cars is the conjectural question in the case—nobody saw the accident, nobody knows how it happened.

Intestate was struck and run over by engine No. 423 or the cars attached to it. He was run over by the very engine or cars that his specific duty then required him to look out for and to have his train, No. 419, out of the way of.

SPECIFICATION OF ERRORS RELIED ON.

SPECIFICATION I.

Error in refusing to charge defendant's request, asserting a construction of the Federal Act, as follows:

"8. It is not the duty of the crew of a switching engine moving through switching yards to ring the bell or give other signals for the benefit of an employee whose duties require him to work in the yards and who knows or by the exercise of ordinary care could know that switching engines were constantly moving through the yards, and who should reasonably anticipate and expect the engine in question, it being the duty of such employee to be on the lookout for the switching engine and not the duty of the crew of the switching engine to be on the lookout for the employee." (Assignment 10, R. p. 144.)

SPECIFICATION II.

Error in refusing defendant's requests asserting a construction of the Federal Act as applicable to the facts adduced in the testimony in the following language:

"6. There is no evidence that the defendant was negligent in that no lookout was kept by the agents of the defendant on the engine which ran over plaintiff's intestate and no evidence that such negligence was a proximate cause of the injuries and death of plaintiff's intestate, and the jury can not consider this allegation of the complaint.

"7. There is no evidence of negligence on the part of the defendant in failing to have an employee on the rear of the engine, which it is claimed ran over plaintiff's intestate, since the entire evidence shows that this was a switch engine, in yard service at the time and not moving on the main line, and there is no evidence that such negligence was a proximate cause of the injuries and death of plaintiff's intestate, and the jury can not consider such allegations of the complaint." (Asignment 9, R. p. 144).

SPECIFICATION III.

Error in refusing to direct a verdict in favor of defendant, because:

a. There was no evidence that plaintiff's intestate was employed in interstate commerce. (Assignments of error 1 and 3, R. pp. 141-142).

b. There was no evidence of negligence proximately contributing to the death of plaintiff's intestate. (Assignments of error 4 and 5, R. pp. 142-143).

c. The evidence admitted only of the inference that intestate assumed the risks. (Assignment of error 6, R. p. 143).

SPECIFICATION IV.

Error in forcing defendant to proceed with the trial under the amended complaint over its objection and against its prayer for an opportunity to answer and prepare to meet the amended complaint, and thus denying defendant due process and equal protection of the laws, in violation of the Fourteenth Amendment. (Assignment of error 2, R. p. 142).

ARGUMENT.

SPECIFICATION I.

Reference to page 125 of the record will show that defendant's request number eight was duly submitted to the trial Court, as required by the rules there prevailing. In printing the record in the Supreme Court of South Carolina, these requests were misplaced by the printer, but it is provided in stipulation on page 126, that this mistake is to be disregarded. This error of the trial Court was duly excepted to, according to the practice in South Carolina. (See exception 20, page 122), and the refusal of this request is passed upon in the opinion of the Supreme Court at page 130. The question is saved for this Court by assignment number 10, page 144.

In so far as concerns the jurisdiction, it is clear that this request asserted a construction of the Federal Act,

which, if acceded to, would presumably have produced a verdict in favor of defendant below and consequent immunity to it from the action. The motion to dismiss must, therefore, be refused upon the authority of *St. Louis I. M. & S. R. Co. vs. McWhirter,* 229 U. S 265, 57 L. ed. 1179; *Seaboard A. L. R. Co. vs. Horton,* 233 U. S., 492, 58 L. ed. 1062, and *Seaboard A. L. R. Co. vs. Tilghman,* decided by this Court May 17th, 1915, U. S. Adv. Ops. No. 14, p. 655.

The ruling of the trial Judge upon defendant's motion for direction of a verdict, in which the correctness and applicability of this construction of the Federal Act was fully argued, shows beyond question that had this construction of the Act been granted, the result would have been a directed verdict in favor of defendant. At page 106, the trial Court said: "The Court: I am impressed with Mr. Lyles' argument. If that rule applied about a man working in the yard, he did not owe him any special duty and he would be entitled to a direction of a verdict."

It is also clear beyond controversy that if this request had been granted, the jury could not have rightfully rendered a verdict in favor of plaintiff under the evidence in the cause. The trial Judge charged defendant's third request to the effect that there was no evidence that the condition of the tracks and walkways had any proximate connection with intestate's injuries (p. 112), and consequently, under this construction, the only allegation of negligence upon which plaintiff could even contend that there was any evidence to go to the jury was the failure to keep a lookout on the part of the crew of engine 423, as it pulled into track No. 4 at the rate of three or four miles an hour. Plaintiff contended that there should have been a lookout on the tank of this switch engine, as it pulled in backwards, by virtue of the provisions of Rule U, p. 50. Plaintiff relies upon the testimony of the witness Spires (p. 34) as furnishing some evidence of a lack of a headlight on engine 423, although this witness, on cross-examination, admitted that he could not undertake to say

whether there was or was not a headlight burning (p. 37), and all other witnesses testified positively that the headlight was burning (Engineer Benton, p. 55; Engineer Hunt, p. 61; Switchman Hamlet, p. 66; Switchman Brown, p. 62). It will be noticed also that this testimony as to the headlight was received under the allegation that no proper signals or warning were given. (See p. 14.) So the entire issue would have been removed from the case if defendant's request number eight had been granted. The question as to the admissibility of Rule U is saved by assignment of error 11, p. 144, and we shall point out on the merits that, in the first place, under the undisputed testimony, there was no evidence making such rule applicable; and, in the second place, it could not be relevant, had the Act been properly construed as contended for by defendant below. His Honor submitted the issue of negligence by reason of an alleged failure to give warning to the intestate to the jury (p. 107).

We submit that if defendant's contention as to the construction of the Act had been granted: First, it would have resulted in the direction of a verdict in favor of defendant; second, it would have resulted in the exclusion of the only testimony which plaintiff contends properly took the case to the jury; and, third, that under a proper instruction to the jury of the duty of the defendant under the Act, it must be presumed that the jury would have rendered a verdict in favor of the defendant.

Coming now to answer the proposition that the contention of plaintiff in error in this respect is frivolous and not of sufficient merit to require the review of the same by this Court, we point out, first, that the Federal Act does not lay down the specific regulations or rules of conduct that the carrier must follow in order to escape the conviction of negligence. It is apparent, however, that these specifications, rules and regulations must be the same in every State in which the Act applies; otherwise, it would be impossible to have a rule of conduct uniform in all States, controlling all carriers by railroad and

employees engaged in interstate commerce. Since the Act does not provide the specifications and regulations or rules of conduct in detail, we must look to the common law to fill the gap, but it must be the common law as it exists uniformly throughout the area to which the Act applies, and still seeking uniformity; this can be found only in the common law as construed uniformly in the Federal Courts, and not in the varying and different rules and regulations found in the common law as construed by the several States.

In the *Mondou* case,, 223 U. S. 1, 56 L. ed. 327, this Court said:

> "Second. The natural tendency of the changes described is to impel the carriers to avoid or prevent the negligent acts and omissions which are made the bases of the rights of recovery which the statute creates and defines; . . .
>
> "We are not unmindful that that end was being measurably attained through the remedial legislation of the several States, but that legislation has been far from uniform, and it undoubtedly rested with Congress to determine whether a national law, operating uniformly in all the States, upon all carriers by railroads engaged in interstate commerce, would better subserve the needs of that commerce." . . .

In *S. A. L. Ry. vs. Horton, supra,* this Court held that the instructions of the trial judge upon the question of the employer's duty, the assumption of risk by the employee, and contributory negligence were erroneously modelled upon the North Carolina Statute, rather than upon the Act of Congress. The decision is clear that it was the intention of Congress to have a uniform rule governing the liability of carriers to their employees engaged in interstate commerce. It is noticeable that in determining the question of assumption of risk, the uniform rule applicable in the Federal Courts was used as the test.

The Court said:

"It is not to be conceived that, in enacting a general law for establishing and enforcing the responsibility of common carriers by railroads to their employees in interstate commerce, Congress intended to permit the Legislatures of the several States to determine the effect of contributory negligence and assumption of risk, by enacting statutes for the safety of employees, since this would in effect relegate to State control two of the essential factors that determine the responsibility of the employer."

In *Seaboard A. L. R. Co. vs. Tilghman,* decided May 17th, 1915, (U. S. Adv. Ops. 1914, No. 14, p. 653), this Court held that the effect to be given to the provisions of the Statute concerning contributory negligence was to be determined according to the decisions of this Court:— thereby giving effect to the purpose of the Act to create a uniform rule.

In *Central Vermont R. Co. vs. White,* decided June 21, 1915 (U. S. Adv. Ops. 1914, No. 17, p. 866), this Court (in subdivision 3) determined the applicability of the doctrine of the assumption of risks according to the uniform rule prevailing in the Federal jurisdiction, relying upon the Horton case, amongst others.

And (in subdivision 4) the Court held that the question as to the burden of proof as to contributory negligence was a matter of substance and was to be decided under the Federal Act according to the uniform rule applicable in the Federal jurisdiction.

The common law rule in South Carolina is that it is for the jury to say whether a railroad company is under a duty to ring a bell, blow a whistle, have adequate headlights or post a man in front of a train moving in its switching yards, to warn its employees working in the yard of the movement of the cars. *Smith vs. Ry.,* 90 S. C., 459; *Muckenfuss vs. Ry.,* 93 S. C., 263.

In other States, the common law rule is that employees in a switching yard, where persons of ordinary intelligence and prudence would know of the constant and ordi-

nary movement of trains engaged in switching, are charged with such knowledge, and since the master's duty to warn can arise only out of the servant's ignorance of the danger to be guarded against, there can be no duty in such a case requiring the employees in charge of a switching train, engaged in an ordinary and customary movement, to look out for or warn other employees of the approach of such train. (See *Jones vs. Ry.*, 83 S. E., 54.)

The uniform rule prevailing in the Federal Courts is the latter. An employee in a switching yard primarily purposed and used for the constant switching movement of cars and engines, is charged with notice of such primary purpose, as a man of ordinary intelligence and prudence, and can reasonably expect no special warning of such a movement so long as it is an ordinary and customary one. The primary purpose of such a yard is the ordinary switching of cars and engines, and employees there take their employment for the purpose of assisting in such, not for the purpose of hindering or delaying it. Employees, therefore, must look out for the moving cars and engines, and so long as there is nothing unusual about the movement, those in charge of the cars and engines are not obliged to look out for employees. *Aerkfetz vs. Humphreys et al., Receivers,* 145 U. S., 418, 36 L. Ed., 758; *Tuttle vs. Ry.*, 122 U. S., 194, 30 L. Ed., 1114; *N. & W. Ry. vs. Gessurne,* 144 Fed., 56, 75 C. C. A., 214; *Connelly vs. Ry.*, 47 L. R. A., (N. S.), 867 and note, 119 C. C. A., 392, 201 Fed., 54.

Coming to the facts in this case, we can safely observe, using the opinion in *Aerkfetz vs. Humphreys, supra,* as our guide, that the entire evidence in this case admits only of the following inferences:

Plaintiff's intestate "was an employee, and, therefore, the measure of duty to him was not such as to a passenger or stranger. As an employee of long experience in that (not to mention his similar and longer experience in other yards), he was familiar with the moving of cars forward and backward by the switch engine. The cars were moved

at a slow rate of speed, not greater than that which was customary, and that which was necessary in the making up of trains." For quite a distance north of him, "there was no obstruction, and by ordinary attention he could have observed the approach" of engine 423. He not only knew that switch engines were busy moving cars, but must have known engine 423 was coming in, because he was waiting for it to pass.

The Supreme Court of South Carolina endeavors to avoid the applicability of defendant's request number eight by saying that if the law were as contended, engine 423 had not theretofore been moving about the yard, that its regular place to work was in another yard, that it had just arrived in the yard where it ran over deceased, and its arrival could not have been expected. (130.)

In the first place, the applicability of this request did not depend on the proposition whether engine 423 was solely engaged in service in the Cayce yards: it was equally applicable whether the engine was so engaged or whether it was coming in from a mainline trip or from the interchange yards just across the Congaree River in Columbia. The testimony of T. A. Barker (beginning at page 8) and of Charlie Brown (beginning at page 70), the only two witnesses who knew the location of deceased at the time switch engine 423 came in, showed that before its arrival deceased had come across from track 8 to track 3, where engine 419 was coupled on to the cars on track 3 and then waiting for the particular purpose of letting 423 pass up the lead track on to track 4 and clear the switch of track 3 so that 419 could get out. The undisputed testimony further shows that engine 423 had left the mainline at a point a good distance to the north, and at the time Koennecke was struck was off of the mainline. (Benton, p. 54; Hunt, p. 60; Hamlet, p. 65.) This testimony further shows that there was a man on the footboard of the engine (in front, as it was moving backwards), until after it had left the mainline and gotten into the yard. The testimony further shows that engine

423 had been constantly engaged in switching between the Cayce yards and Columbia, and that deceased must have known that it was engaged in coming in and going out of the Cayce yards (see p. 57) : this was the "transfer engine working backward and forward" between such points, referred to at page 73.

The Court was clearly in error as to the facts making the request applicable and also in saying that there was any evidence leaving it to the jury to determine the applicability of Rule U. Defendant's request did not assume any facts, but was hypothetical. If it did assume any facts, the ones assumed were not in dispute. The constitutional provision in South Carolina, forbidding a judge to charge respecting matters of fact, does not forbid a charge predicated on hypothetical facts or a charge based on facts not in dispute. *Jenkins vs. Ry.,* 58 S. C., 373, 380; *Riser vs. Ry.,* 67 S. C., 431; *Jennings vs. Mfg. Co.,* 72 S. C., 420.

We submit, therefore, that this question gives the Court jurisdiction, and that it is clearly of merit so as to require the reversal of the cause, even within the doctrine of *Seaboard A. L. R. Co. vs. Padgett,* 236 U. S., 668, 59 L. ed, .

SPECIFICATION II.

The argument already advanced under Specification I, including the discussion of the testimony, shows that these instructions asserted a proper construction of the Federal Act, that they were applicable to the case, that their refusal was erroneous, and fundamentally prejudicial to defendant's rights under the Federal Act.

SPECIFICATION III.

We rely upon *Seaboard A. L. R. Co. vs. Padgett,* 236 U. S., 688; 59 L. ed., , in support of "the contention that error was committed by the trial Court in not taking the case from the jury and instructing a verdict for the defendant upon the assumption that there was no evi-

dence sufficient to justify the submission of the case to the jury for its consideration," and shall briefly review the testimony in order to point out that there is merit in this contention.

The grounds of the motion for the direction of a verdict are found at page 104. The motion was made in accordance with Rule LXXVII of the Circuit Courts of South Carolina. (See Appendix.) The refusal of such a motion, when duly excepted to, raises a question of law for the consideration of the Supreme Court. *Guess vs. Ry.*, 88 S. C., 87; *Wyatt vs. Cely*, 86 S. C., 539-544; *Baker vs. Telegraph Co.*, 84 S. C., 477; *Stone vs. A. C. L. Rd. Co.*, 96 S. C., 228; *Jones vs. C. & W. C. Ry.*, 98 S. C., 197. The effect of the judgment of the Supreme Court on such a question is provided for by Rule XXVII of that Court. (See Appendix.) *Crosby vs. Ry.*, 83 S. C., 575. The South Carolina practice does not require the saving or making of an exception before the jury leaves the bar or at any time before the rendition of verdict or entry of judgment. This practice is governed by Section 384 of the Code of Procedure. (See Appendix.) Notice of intention to appeal and the case and exceptions in this cause were duly served and agreed to (pp. 115, 116 and 126). The refusal of the trial Judge to direct a verdict was duly excepted to. (See exceptions 7, 8, 9, 10, 11, 12 and 13.) In the meanwhile, a motion for a new trial had been made (p. 114), and the first ground thereof raised the legal question whether there was any evidence to support the verdict under the charge of the trial Judge. The motion was refused and this refusal was excepted to by exception 21 (p. 123), and this question is saved for this Court by assignment 5 (p. 143). *Dent vs. Bryce*, 16 S. C., 1; *Thompson vs. Lee*, 19 S. C., 489; *McCord vs. Blackwell*, 31 S. C., 138; *Buist Co. vs. Lancaster Co.*, 68 S. C., 526; *Towles vs. Ry.*, 83 S. C., 504. Assignments 3, 4 and 6 bring up the question of the direction of a verdict on the other grounds.

SUBDIVISION A. THERE WAS NO EVIDENCE THAT PLAINTIFF'S INTESTATE WAS EMPLOYED IN INTERSTATE COMMERCE.

Plaintiff having pitched her case under the Federal Act and having failed in her testimony to show that her intestate was engaged in interstate commerce at the time of his injuries, defendant was entitled to a directed verdict. *Seaboard A. L. R. Co. vs. Duval,* 225 U. S., 477, 482; 56 L. ed., 1171, 1174; *Grand Trunk Railway vs. Lindsay,* 233 U. S., 42; 58 L. ed., 838.

In *Illinois Central R. Co. vs. Behrens,* 233 U. S., 473; 58 L. ed., 1051, this Court pointed out that a general employment in a switching yard devoted indiscriminately to inter- and intra-state commerce is not sufficient. The Act applies only to "injuries occurring when the particular service in which the employee is engaged is a part of interstate commerce."

The last movement made by intestate was in taking the caboose off of train No. 67, on track No. 3, and taking the same to track No. 8, as the first step in making up the return local to go out the next morning. Train No. 67 was a local freight between Hamlet and Columbia. It does not appear what was the character of any of the cars that came in on this train, although it does appear that this was strictly a local train, and so it was not at all certain that it would bring to Columbia a single car or piece of merchandise either coming from North Carolina or beyond or going to some other State. The Court might assume that the caboose did come from Hamlet and was moved to track No. 8 for the purpose of going back to Hamlet. In making this movement, then, from track No. 3 to track No. 8, intestate was engaged in interstate commerce, *but this movement had been completed,* and intestate's engine, No. 419, as well as intestate, had come back to track No. 3 and the engine had been coupled to the remaining cars that came in on train No. 67. The immediate purpose of intestate and the particular service in which he was engaged at that time, which was the time

of his injuries, was in switching these cars which came in on a local freight which started at Hamlet. There was, however, absolutely no testimony that any of these cars or any piece of merchandise in them was interstate. There was testimony that train No. 67 was strictly local, originating at Hamlet and taking up and leaving cars and merchandise at every local stop between Hamlet and Columbia. The facts, therefore, would not justify a presumption that any of the cars, other than the caboose, or any piece of merchandise in the cars was interstate. We refer the Court to the following testimony: Barker, 9-10, 11-19, 23, 25-26; Charlie Brown, 71-72; Thornton, 92-93.

The primary purpose of the crew in removing the cars from track No. 3 to track No. 8 was to make up the local freight to go north. There may have been some advancement in this work in order to permit engine No. 77 to get through track No. 3 to the roundhouse, but this would not color the work that intestate was then doing so far as to make it directly connected with an interstate movement. A local freight in its regular journey often takes a side track in order to expedite the movement of an interstate train, either freight or passenger, and thus in an indirect manner does expedite interstate commerce. This does not make the crew of the local train engage in interstate commerce. It is merely subordinating intrastate commerce to interstate commerce and does not qualify the character of the work of the local crew within the meaning of the Act.

SUBDIVISION B. THERE WAS NO EVIDENCE OF NEGLIGENCE PROXIMATELY CONTRIBUTING TO THE DEATH OF PLAINTIFF'S INTESTATE.

St. Louis I. M. & S. R. Co. vs. McWhirter, 229 U. S., 265; 57 L. ed., 1179,establishes that the question is still open for review in this Court whether there was any evidence of negligence on the part of the defendant and whether there was any evidence proximately connecting any breach

of duty shown to have existed with the injuries suffered by intestate. In order to show the merit in the position, asking this Court to review the evidence on this point, we briefly point out the evidence on each of the allegations of negligence contained in the complaint.

The trial Court charged defendant's third request, that there was no evidence tending to show that the failure of defendant to have the tracks and walk-ways between the tracks in proper condition was a proximate cause of intestate's injuries, and this removes this allegation of the complaint from the case (112).

Coming to the other allegations of negligence:

a. That the yards were improperly lighted.

The plaintiff not only failed to show a lack of proper lights in the yards, but, on the contrary, the evidence admits only the inference that the lights were entirely adequate and proper. Plaintiff's witness Barker, pages 16, 20-21, 23-24, 25; plaintiff's witness Spires, p. 38; defendant's witness Garrett, pp. 78-79, 80. The headlight on No. 77 was burning and lighted up the place where intestate was located as engine No. 423 came in. Pp. 66, 72, 81-82.

We submit that from this testimony no reasonable inference can be drawn that the yards were not properly lighted and further that any failure to have lights had any proximate connection with intestate's injuries.

b. That the train consisted of an engine and a great number of box cars.

c. That the engine was backing with a tender in front.

Defendant below requested the trial Judge to eliminate these issues from the jury, by its 4th and 5th requests (p. 125), and his refusal to do so was excepted to in the Supreme Court of South Carolina. (Exceptions 15 and 16, p. 121.) The Supreme Court of South Carolina acknowledged the error in the refusal of these requests but stated that their refusal could not have been prejudicial. In assignment 8 this ruling of the Supreme Court of South Carolina is brought up for review, and with

regard to that assignment, we submit that the assumption that the jury were men of common sense and that it was inconceivable that they found against the defendant on such grounds can have no place under the facts of this case. Intestate was fifty-one years of age (47, 88). He had made during the five months that he worked for defendant $572.77 (102), an average monthly earning of $114.55-2/5; an average yearly earning of $1,374.60. His expectancy was 20.2 years. The present value of $1.00 per annum for twenty years, at 7 per cent., the legal South Carolina rate, is $10.594. Multiplying his average yearly income by $10.594 to get the present value, we find it to be $14,562.51240. Deducting one-fourth, which would reasonably represent the portion consumed by the deceased personally, we get $10,921.88430, as the entire reasonable financial expectancy of the beneficiaries. There was no testimony of fatherly advice or assistance in the education of the children sufficiently definite to be made the basis of a pecuniary calculation. *Michigan Central Railway vs. Vreeland,* 227 U. S., 59; 57 L. ed., 417. Yet, the jury rendered a verdict for $22,500.00. It was not supported by the law or the evidence. We submit that it must be deemed to have been capricious and sympathetic, and that a jury rendering such a verdict can not be assumed to be men of common sense who would be guided by the material issues in the testimony, irrespective of the charge of the Court.

d. That no proper lookout was kept or warning given by the crew of engine No. 423, which ran over intestate.

We have heretofore discussed the evidence bearing on these points and have shown that under a proper construction of the Act and the undisputed facts of this case, there was no requirement that the crew of engine No. 423 should look out for intestate, but that, even granting that there was such a requirement, all proper precautions were taken in the way of lookout and warning, including the question of headlight.

CONCLUSION.

In concluding this point we submit that even granting that the testimony shows a breach of duty on the part of defendant under some one or more of the allegations of the complaint, there is no evidence to justify the reasonable inference that such breach of duty was a proximate cause of intestate's death. The cause of intestate's death is a matter of pure surmise and it is no more reasonable to conjecture that it was caused by the negligence of the defendant in any of the particulars alleged than it is to conjecture that it was caused entirely by the negligence of intestate, by a mistake of judgment on his part, or in any other manner to which the limitless road of conjecture may lead us. Upon this phase of the question we strongly rely upon *Patten vs. T. & P. R. Co.*, 179 U. S., 658; 45 L. ed., 361; and *Green vs. Railway*, 72 S. C., 398.

SUBDIVISION C. THE EVIDENCE ADMITTED ONLY OF THE INFERENCE THAT INTESTATE ASSUMED THE RISKS.

We have pointed out that his Honor, by charging defendant's request number three, withdrew from the consideration of the jury any question of negligence in having the walkways in an improper condition. Let us assume, however, that the Court finds some evidence admitting the inference of negligence in one of two particulars, say,

1. As to the improper condition of the yard, as to lights, etc., otherwise than as to walkways; and,

2. As to the movement of the trains in the yard, particularly engine No. 423.

In *S. A. L. Ry. vs. Horton, supra*, it is established that the common law rule of assumption of risks applies under the Federal Act, according to the uniform rule applicable in the Federal Courts, in cases where there is no violation of any Federal statute enacted for the protection of the employee, and ours is such a case. Under that rule, the servant assumes even the risks caused by the master's neg-

ligence where they are open and obvious or actually known to the servant and where the servant voluntarily exposes himself thereto, even though in the performance of a duty.

As already pointed out, intestate was an active man in good health, with good eyes and good ears (R. p. 48). He had had an experience of seven months in the Cayce yards, doing exactly the same kind of work under exactly the same, if not improving conditions, and exposed to exactly the same risks and dangers that caused his death. We call attention to the deceased's own statement of his experience in yard service, as set forth in his application (R. pp. 88-89); also, to his own statement of his physical condition and capacity (R. pp. 89-); also, to his acknowledgment of the necessity of informing himself of the rules of the company (R. pp. 89-90); also, to his acquaintance with the risks of service (R. p. 90); also, to rules 422, 423, 424 and 461 (R. p. 101). There can be no question that all of the conditions in the Cayce yards, including the customary movement of switching engines and trains, were known to intestate, and that there had been no change for the worse in such conditions during his employment (R. pp. 90-92, 102).

If plaintiff desired to overcome the assumption of risks by showing that intestate had complained of defects and that there was a promise of remedy, the burden, of course, was upon plaintiff to do so. The only testimony of this was to the effect that he had never made complaint (R. pp. 93, 102). If there was anything wrong with the Cayce yard, it had been wrong the entire time intestate was working there, and any defect as to lights, etc., must have been known to him during this time. The testimony already referred to conclusively shows that the movement of engine No. 423 was absolutely as was customary, and if there was anything wrong about this movement, it was no more than intestate was familiar with, and, as a reasonable man, must have anticipated. Under the undisputed facts in this case, no other inference can be drawn than that intestate assumed the risks of the danger

causing his death, be they in one or the other of the classes specified above, and even though they were due to the negligence of the defendant. *Randall vs. Ry.*, 109 U. S., 478, 27 L. ed., 1003; *Tuttle vs. Ry.*, 122 U. S., 194, 30 L. ed., 1114; *So. Ry. vs. Logan*, 138 Fed., 725.

SPECIFICATION IV.

We concede that in a suit under the Federal Act, questions which relate to matters of pleading, to the admissibility of evidence, sufficiency of exceptions and to various rulings of the trial Court, involving no construction of the Federal statute, can not be considered by this Court, under the doctrine announced in *Central Vt. Ry. vs. White, supra.* Our contention is that defendant below was deprived of its property without due process of law and denied the equal protection of the laws, in violation of the 14th Amendment to the Constitution of the United States, by being forced to proceed with the trial under the amended complaint, of which it had had no previous notice, and in denial of its prayer for reasonable time within which to answer and prepare to meet such amended complaint.

We concede that the question of the power of the Circuit Court to grant the amendment and the question whether it properly exercised its discretion in granting the amendment, are questions of South Carolina practice, not reviewable here. But we do not concede that the trial Court could then force defendant to trial under a new complaint without notice and opportunity to meet the same, and contend that under the 14th Amendment, this Court will decide that defendant was denied due process of law by such procedure.

We also concede that the due process clause of the Fourteenth Amendment does not "control mere forms of procedure in State Courts, or regulate the practice therein. All its requirements are complied with, provided, in the proceedings which are claimed not to have been due process of law, the person condemned has had

sufficient notice, and adequate opportunity has been afforded him to defend." *L. & N. R. Co. vs. Schmidt,* 177 U. S., 230, 236; 44 L. ed., 747.

The record on this point is found at pages 26 to 33, 51-53, 80, 104. The matter is discussed at length in the petition for a rehearing found at pages 131-138.

There can be no question that the Lord Campbell's Act of South Carolina, heretofore quoted, creates a new and distinct cause of action that does not otherwise exist and can be enforced only according to its terms. *Norhden vs. Ry.,* 54 S. C., 492; *Mayo's Estate,* 60 S. C., 401; *Morris vs. Gas Co.,* 70 S. C., 279. In an action under it, the jury may award such damages, including exemplary damages, as they may think "proportionate to the injury resulting from such death" to the (beneficial) parties respectively. Such damages are not limited to the reasonable expectancy of pecuniary benefits on the part of the beneficiaries, but include damages by way of solution, loss of companionship, mental anguish and wounded feelings of the beneficiaries. *Hull vs. Ry.,* 76 S. C., 278; *Osteen vs. Ry.,* 76 S. C., 380; *Petrie vs. Ry.,* 29 S. C., 303; *Strother vs. Ry.,* 47 S. C., 375; *Garrick vs. Ry.,* 53 S. C., 458; *Morris vs. Gas Co., supra,* 70 S. C., 279; *Brickman vs. Ry.,* 77 S. C., 319. The defense of contributory negligence is a complete bar under the Lord Campbell's Act of South Carolina. *Stone vs. Ry.,* 96 S. C., 228, but Article 9, Section 15, of the Constitution of South Carolina, deprives the railroad of the defense of assumption of risks. (See Appendix.) Under the South Carolina statute, the right of the beneficiaries to recover depends only upon the relationship, and the question of dependency is relevant only to the extent that the jury may consider it in determining the damages they think "proportionate to the injury resulting from such death." The question of dependency does not affect the right to recover. *Barksdale vs. Ry.,* 76 S. C., 183; *Trimmier vs. Ry.,* 81 S. C., 213.

The essential differences between a cause of action under this Statute and one under the Federal Act are immediately apparent from this statement.

When, therefore, the plaintiff sought to change her complaint by alleging the facts that the defendant carrier was engaged, and the plaintiff's intestate employed, in interstate commerce, she sought absolutely to change her cause of action from one under one statute to one under another and different statute, as these are the two facts making the Federal Act applicable. *Seaboard A. L. Ry. vs. Duvall,* 225 U. S., 477, 482, 56 L. ed., 1171, 1174; *Grand Trunk Ry. vs. Lindsay,* 233 U. S., 42, 58 L. ed., 838.

The theory of the Supreme Court of South Carolina that the change made by the amendment was merely technical and not substantial is contrary to the decisions of this Court. *Troxell vs. Delaware L. & W. R. Co.,* 227 U. S., 435, 57 L. ed., 586; *St. Louis I. M. & S. R. Co. vs. Hesterly,* 228 U. S., 702, 57 L. ed., 1031; *St. Louis S. F. & T. R. Co. vs. Seale,* 229 U. S., 156, 57 L. ed., 1129; *N. C. R. Co. vs. Zachary,* 232 U. S., 248, 58 L. ed., 591; *Toledo St. L. & W. R. Co. vs. Slavin,* decided Feb. 23, 1915, U. S. Adv. Ops. 1914, No. 9, page 306.

These decisions show clearly that the cause of action existing under the facts alleged in the original complaint was entirely distinct and separate from the cause of action existing under the complaint, as amended. The decision of this Court in *Missouri K. & P. R. Co. vs. Wulf,* 226 U. S., 570, 57 L. ed., 355, is no authority for the proposition for which it is cited by the Supreme Court of South Carolina. In that case, the original complaint or petition distinctly alleged that the defendant was engaged and the deceased employed in interstate commerce, and the only change made by the amendment was the substitution of the mother as administratrix in lieu of the same person in her individual capacity—the mother being the sole beneficiary under both statutes. This Court very properly held that the allegations of fact as to the engagement of defendant and employment of deceased in interstate com-

merce brought the petition within the Federal Act, it not being necessary to expressly refer to a statute by name or otherwise, beyond stating the facts making the statute applicable, and, therefore, the allegations concerning the applicability of the Kansas statute were mere conclusions of law and surplusage. With reference to the amendment, the Court distinctly said that it was "an amendment that, without in any way, modifying or enlarging the facts upon which the action was based, in effect merely indicated the capacity in which the plaintiff was to prosecute the action." The amendment inserts the fundamental controlling allegations of fact that defendant was engaged and intestate employed in interstate commerce. It inserts the essential facts making the difference between a cause of action under the State statute and a separate and distinct cause of action under the Federal Act. Plaintiff below relied upon *Wabash R. Co. vs. Hayes,* 234 U. S., 86, 58 L. ed., 1226. In that case, the complaint originally alleged that the defendant was engaged and plaintiff employed in interstate commerce, but upon the conclusion of the testimony, defendant requested an instruction that the evidence did not admit of the inference that plaintiff was employed in interstate commerce, and, therefore, the Federal Act had no application. The instruction was granted and the State Court treated the allegations as to interstate commerce as eliminated and submitted the case to the jury under the common law prevailing in the State. This Court held that defendant, having requested the instruction, and the same having been granted, defendant was granted the only Federal right claimed—that the Federal Act did not apply—and, consequently, the writ of error was dismissed for lack of jurisdiction. This Court said that the question whether the allegations as to interstate commerce could be eliminated and the case submitted to the jury under the common law, was one purely of local practice. Our case presents the converse question whether allegations of fact as to interstate commerce can be inserted by amendment. We admit that

the question whether this could be done is one purely of local practice, but we do not admit the right of the State Court to force the defendant to trial under the new complaint without notice or reasonable opportunity to defend. The due process clause protects against any such procedure, which denies to a party such substantial rights.

The theory of the Supreme Court of South Carolina that this defendant had not pleaded the Federal Act or the facts showing the engagement of defendant and employment of plaintiff in interstate commerce, and that under such pleading, defendant could not have properly brought out such facts and relied upon the Federal Act to show that the case of action under the State Statute was inapplicable is equally untenable under the decisions of this Court. Under the Hesterly, Seale and Slavin cases, *supra,* this Court distinctly holds that in a suit under the common or statutory law of the State, the defendant has a right to prove that the case of action alleged does not exist by showing the facts making the Federal Act applicable. This is the right inhering in a carrier engaged in interstate commerce under such Act, and the theory of the Supreme Court of South Carolina denies to a carrier engaged in interstate commerce this substantial Federal right. It is pertinent to call attention to the fact that before the decision in the case of *Mims vs. A. C. L. Rd. Co.,* 100 S. C., 375 (A. S. No. 3), such evidence would have been admissible under a general denial as affirmative evidence defeating the cause of action alleged under the State law. *Wilson vs. Ry.,* 51 S. C., 92. In this connection, we respectfully refer the Court to an elaborate discussion of this entire question in *Moliter vs. Wabash R. Co.,* 168 S. W., 250.

The defendant was, therefore, forced on to trial on an entirely distinct and separate cause of action, on which it had never been summoned into Court and on which it had had no notice. It was forced to proceed with the trial of this new case over its objection and its prayer for a reasonable time within which to prepare to meet the new

case was denied. This question was properly reserved for consideration by the Supreme Court of South Carolina by exceptions 4 a, b and c, 5 and 6 (R. pp. 117-119), and is again reserved for this Court by assignment 2 (R. p. 142). The defendant in this way specially set up and claimed its right under the Fourteenth Amendment at the first possible opportunity in the trial Court, and presented it directly and clearly to the Supreme Court of South Carolina, according to the practice of this State. The record shows that the question was presented to the Court below in this manner and in order to pronounce its judgment, not only the Circuit Court, but also the Supreme Court, must necessarily have decided this Federal question against the defendant, as the judgment of either Court could not have been reached without such a decision. *Kankana W. P. Co. vs. The Green Bay, etc., Canal Co.,* 142 U. S., 254, 35 L. ed., 1004.

Respectfully submitted,

J. B. S. LYLES,
Attorney for Plaintiff in Error.

APPENDIX.

RULE LXXVII OF CIRCUIT COURTS OF SOUTH CAROLINA.

Objections for Want of Evidence—Remedies.—The point that there is no evidence to support an alleged cause of action shall be first made either by a motion for nonsuit or a motion to direct the verdict; and the point that there is no evidence to support a defense shall be first made by motion to direct a verdict. (Code of Laws, 1912, Vol. II, page 756.)

RULE XXVII OF THE SUPREME COURT OF SOUTH CAROLINA.

Reversal for Lack or Failure of Evidence.—Whenever an appeal to this Court is sustained on the ground that

a nonsuit should have been granted or a verdict directed because of a total failure of evidence or because the evidence could admit of but one inference, the reversal of the judgment shall have the same effect, as if the nonsuit had been ordered, or a verdict returned under the direction of the Circuit Judge. *Provided,* That this rule shall not be applicable when the cause of action was not barred by the statute of limitations, at the time said orders were referred on circuit, but would be barred at the time they were reversed by the Supreme Court. (Code of Laws, 1912, Vol. II, page 731.)

SECTION 384 OF THE CODE OF CIVIL PROCEDURE.

Notice of Intention to Appeal—Serving Case With Exceptions—Objections and Alterations.—1. In every appeal to the Supreme Court from an order, decree or judgment granted or rendered at Chambers from which an appeal may be taken to the Supreme Court the appellant or his attorney shall, within ten days after written notice that the said order has been granted or decree or judgment rendered, give notice to the opposite party or his attorney of his intention to appeal, and in all other appeals to the Supreme Court the appellant or his attorney shall, within ten days after the rising of the Circuit Court, give like notice of his intention to appeal to the opposite party or his attorney, and within thirty days after said notice the appellant or his attorney shall prepare a case with exceptions and serve them on the opposite party or his attorney. The respondent within ten days after service of such case may propose any objections thereto or alterations thereof, and the case should be settled in such mode as may be provided in the rules of the Supreme Court: *Provided,* That whenever a motion for a new trial upon the Judge's minutes shall have been made and the decision thereon not be both heard and filed at the term at which the trial is had, then notice of intention to appeal either from the judgment or the order granting or refus-

ing a new trial shall be given to the opposite party or his attorney within ten days after written notice that such order has been granted or rendered.

5. AGREEMENTS UPON STATEMENT OF CASE.—Upon appeals to the Supreme Court, in case the attorney for the appellant and respondent shall agree upon a statement of the case as prepared by them for the hearing of the Supreme Court, such statement of the case shall be a sufficient brief of the same, and no return or other paper from the Circuit Court shall be required.

Upon the transmission of a certified copy of such agreement to the Clerk of the Appellate Court, within the time now required by law, he shall place said cause on the docket for a hearing by said Court. (Code of Laws of South Carolina, 1912, Vol. II, page 147.)

Article IX, Section 15, of the Constitution of South Carolina:

RIGHTS AND REMEDIES OF EMPLOYEES.—Every employee of any railroad corporation shall have the same rights and remedies for any injury suffered by him from the acts or omissions of said corporations or its employees as are allowed by law to other persons not employees, when the injury results from the negligence of a superior agent or officer, or of a person having a right to control or direct the services of a party injured, and also when the injury results from the negligence of a fellow servant engaged in another department of labor from that of the party injured, or of a fellow servant on another train of cars, or one engaged about a different piece of work. Knowledge by any employee injured of the defective or unsafe character or condition of any machinery, ways or appliances shall be no defence to an action for injury caused thereby, except as to conductors or engineers in charge of dangerous or unsafe cars or engines voluntarily operated by them. When death ensues from any injury to employees, the legal or personal represen-

tatives of the person injured shall have the same right and remedies as are allowed by law to such representatives of other persons. Any contract or agreement, expressed or implied, made by any employee to waive the benefit of this Section shall be null and void; and this Section shall not be construed to deprive any employee of a corporation, or his legal or personal representative, of any remedy or right that he now has by the law of the land. The General Assembly may extend the remedies herein provided for to any other class of employees.

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In the Supreme Court of the United States.

OCTOBER TERM, 1915.

No. 491.

SEABOARD AIR LINE RAILWAY, PLAINTIFF IN ERROR,

vs.

MRS. BEAUREGARD MAGDALENE KOENNECKE, AS ADMINISTRATRIX OF THE ESTATE OF J. T. KOENNECKE, DECEASED, DEFENDANT IN ERROR.

ON WRIT OF ERROR TO THE SUPREME COURT OF SOUTH CAROLINA.

MOTION TO DISMISS OR AFFIRM AND BRIEF.

Now comes the defendant in error, Mrs. Beauregard Magdalene Koennecke, as administratrix of the estate of J. T. Koennecke, deceased, by her counsel, C. S. Monteith, F. G. Tompkins and W. H. Cobb, appearing in her behalf, and moves the Court to dismiss the writ of error in the above entitled cause, for want of jurisdiction and upon the grounds set forth in the brief filed herewith.

The defendant in error further moves the Court to affirm the judgment rendered by the Supreme Court of the State of South Carolina upon the ground that it is manifest that the writ of error

was taken for delay only, and that the questions from which the decision of the cause depends are so frivolous as not to need further argument.

The defendant in error further moves the Court in the event that it should desire to hear argument on the questions involved, that this cause be transferred to the summary docket, and there be proceeded with on the ground that the cause is of such character as not to justify extended argument.

The grounds of this motion, the statement of the case and the arguments thereon, are more fully set forth in the accompanying brief, all of which is respectfully herewith submitted.

C. S. MONTEITH,
F. G. TOMPKINS,
W. H. COBB,
Attorneys for Defendant in Error.

Lyles & Lyles, Attorneys for the Seaboard Air Line Railway, Plaintiff in Error.

DEAR SIRS: Please take notice that on Monday, the 11th day of October, A. D. 1915, at the opening of the Court, or as soon thereafter as counsel can be heard, the motion, of which the foregoing is a copy, will be submitted to the Supreme Court of the United States, for its decision.

Attached hereto, please find copy of the motion to dismiss or affirm, the brief and argument to be submitted in support thereof, and also the motion to transfer this cause to the summary docket, if the Court should desire to hear argument thereon.

C. S. MONTEITH,
F. G. TOMPKINS,
W. H. COBB,
Attorneys for Defendant in Error.

The foregoing notice is hereby accepted and delivery of a copy thereof, together with the above mentioned motion and brief therein mentioned, are hereby acknowledged this ——— day of ———, A. D. 1915.

———.

In the Supreme Court of the United States.

OCTOBER TERM, 1915.

No. 491.

SEABOARD AIR LINE RAILWAY, PLAINTIFF IN ERROR,

vs.

MRS. BEAUREGARD MAGDALENE KOENNECKE, AS ADMINISTRATRIX OF THE ESTATE OF J. T. KOENNECKE, DECEASED, DEFENDANT IN ERROR.

STATEMENT OF DEFENDANT IN ERROR.

This was an action brought by Mrs. B. M. Koennecke, as administratrix of the estate of J. T. Koennecke, for the benefit of herself and the children of Mr. Koennecke, who were dependent upon him for support, comfort and maintenance in life, for damages for his death, which she alleged was caused by the negligence of defendant, Seaboard Air Line Railway, on the 13th day of June, 1913, in the company's yard in the town of Cayce, Lexington county, S. C., which town is just across the river from the city of Columbia. The complaint alleged the following acts of negligence on the part of the defendant: (1) In failing to furnish a safe place for the plaintiff's intestate to work; (2) in failing to furnish adequate lights for his protection; (3) in having the track and walkways between the tracks in a dangerous and unsafe condition, as aforesaid; (4) in failing to give the proper warning of the approaching train; (5) in failing to keep a proper lookout, and (6) in failing to keep an employee on the rear of the engine, as aforesaid.

The defendant admitted that J. T. Koennecke was in their employ as a switchman in the Cayce yards, and that he was run

over by a train of the defendant and received injuries from which he died, but denies all other allegations of the complaint, except paragraphs one and two, which allegations were with regard to the death of the deceased, his heirs, and the fact that administration had been taken out, and that the defendant was a corporation and a common carrier operating as a railroad company. The answer further sets up the defense of contributory negligence and assumption of risk.

The third witness sworn by the plaintiff at the trial was Mr. T. A. Barker, who was yard conductor, and under whom Mr. Koennecke was working as a switchman. He was examined by plaintiff as to the facts in the case, but up to that time and when he was taken by the attorney for defendant for cross-examination, no evidence had come out as to whether the deceased was engaged in interstate or intrastate business at the time of his death, and no evidence whatever had come out as to whether the train on which he was working was engaged in interstate business. During the cross-examination of that witness, beginning at Case, folio 25 to folio 28, and again in recross, beginning at folio 35, the attorney for the defendant brought out facts which showed conclusively that the intestate was at the time of his death engaged in interstate commerce. At folio 36 the attorney for the plaintiff called the attention of the Court to this fact and to the fact that this evidence was brought out by the defendant, and asked that they be allowed to amend the complaint by stating that the defendant was engaged in interstate traffic at the time of the death of the intestate, and that the intestate was employed and acting in that service, at said time.

The attorney for the defendant objected to the amendment, on the ground that it totally changed the cause of action which the plaintiff had brought. During the argument and before the authorities had been called to the attention of the presiding Judge, he indicated an opinion that such was the case, but, after due consideration, ruled that the amendment was proper, and ordered the case on to trial.

It appeared from the evidence that a train carrying interstate freight had arrived in the Cayce yard from Hamlet, North Carolina, and had been taken charge of, in accordance with the custom, by the yard conductor, Barker, and his assistant, Koennecke, the intestate, and when the intestate, by the instructions of his yard conductor, was breaking up and distributing the different cars of the said train, a train with the engine backing, pulling a string of cars, came into the Cayce yard from the city of Columbia, ran

over the intestate and injured him so that within a short time he died.

It appeared further that the yard was very poorly lighted, and there was some evidence that there was no light on the back end of the tender, which was the most forward part of the train of cars, and it was admitted that there was no person on the back end of the engine keeping a lookout along the track, and Rule "U," of General Instructions, was put in evidence, requiring that a person should be on the rear of an engine being moved backward, to keep a lookout for persons and obstructions on the track. It was contended by the defendant that this rule did not apply to the movement which was being made. It appeared that the ground between the tracks was covered with rough clinkers, a photograph of which was submitted in the case. There was no eyewitness, so far as the evidence showed, to the death of the intestate. There was no warning of the approach of the said train, and no evidence that the engineer or fireman were keeping a lookout along the track. It was proven that intestate's wife, the plaintiff in this case, her infant son and her unmarried daughter, were the only members of the family who were dependent upon him for support and maintenance. A married daughter and an adult son making no claim to any part of the verdict.

The jury found for the plaintiff in the sum of $22,500.00, apportioning it as follows: Twelve thousand five hundred to intestate's wife, $3,000.00 to his infant son, and $7,000.00 to his dependent unmarried daughter. From that verdict an appeal was taken.

The Supreme Court of South Carolina in examining the record presented to that Court from the trial Court, dismissed the appeal in a brief opinion, which opinion was concurred in by the entire Court and which is fully set forth in the transcript of record filed in this Court, commencing at folio 176 and ending at folio 183.

In this opinion certain findings of fact were made by the Supreme Court of South Carolina, but these, we submit, will not be reviewed by this Court.

ARGUMENT.

It becomes manifest from an examination of the assignments of error that the purpose of this appeal is for delay only.

There are eleven assignments of error.

The first assignment complains of the ruling made by the trial Court and affirmed by the Supreme Court of South Carolina in allowing the plaintiff on the trial to amend her complaint so as to

conform to the facts proven on the witness stand. The allowance of this amendment in no way contravened the Federal Act. The Court merely gave effect to a rule of local practice.

See:
Birt v. *Ry.*, 87 S. C., 239;
Shelton v. *Ry.*, 86 S. C., 198;
Hewlett v. *Ry.*, 93 S. C., 76,

and such practice has the approval of this Court.

See:
Mo. Pacific Ry. v. *Wulf*, 226 U. S., 570;
Zackary v. *Ry. Co.*, 232 U. S., 248;
Wabash Ry. Co. v. *Hayes*, 234 U. S., 86;
Toledo & O. C. Ry. Co. v. *Slavin*, 35 Sup. Ct. Rep., 306.

The second assignment of error complains because the trial Court ordered the case to trial after the amendment. In disposing of this exception the Supreme Court of South Carolina said:

> "The amendment allowed in the case at bar was clearly within the power and discretion of the Court. Such an amendment may be allowed even during the trial, when it does not so materially change the claim or defense as to result in prejudice to the adverse party.
>
> *Shelton* v. *Ry.*, 86 S. C., 98, 67 S. E. 899;
> *Birt* v. *Ry.*, 87 S. C. 239, 69 S. E. 233;
> *Hewlett* v. *R. Co.*, 93 S. C. 76, 76 S. E. 32.
>
> Where such amendments are asked for during the trial, if the opposite party would be misled or surprised thereby to his prejudice, it is incumbent upon him to make the fact appear by affidavit or otherwise, to the satisfaction of the Court; and, if that is done, the Court would either refuse the amendment, or, granting it, would continue the hearing, or impose such other terms and conditions as it might deem necessary to prevent prejudice. *Shelton* v. *Ry., supra.*
>
> Defendant contends further that the Court erred in ordering the trial to proceed after the amendment was allowed, notwithstanding the statement made by its attorney that he was not prepared to meet the issue of the alleged dependency of the widow and children upon deceased. The record shows that defendant resisted the motion to amend chiefly on the assertion of the want of power in the Court to grant it, and that its main

purpose was to obtain a nonsuit. Evidently the statement of counsel that his only objection to proceeding with the trial was that he was not prepared to meet the issue of dependency did not satisfy the Court that he would suffer prejudice on that score; for the Court stated, time and again, that if counsel was taken by surprise and was not prepared to proceed with the trial, he would not force him to go on. When counsel first raised the objection that he was not prepared to meet the issue of dependency, plaintiff's attorneys consented to strike out the names of two of the children alleged to be dependent, and then claimed damages only for the widow, an unmarried adult daughter and a minor son, who were all shown by clear and undisputed testimony to have been dependent on deceased. Under all the circumstances, as they appear in the record, appellant has failed to satisfy this Court that the trial Judge abused his discretion. Though the plaintiff and her children all resided in the city of Columbia, where the case was tried, and had resided here with deceased for more than ten years, and the trial lasted three days, no effort at all appears to have been made by the defendant to procure any testimony rebutting or questioning that of the plaintiff on the issue of dependency, not even by cross-examination of her witnesses. We are impressed that the defendant's objection was interposed rather for the purpose of obtaining a technical advantage, and a ground for a new trial, in the event of an adverse verdict, than for the purpose of getting time and opportunity to prepare to meet the alleged new issue, and that, if he had any showing that he was taken by surprise to his prejudice and had earnestly asked for time to meet the issue, his request would have been granted."

This finding of fact by the Supreme Court of South Carolina seems to us to dispose of this question and we respectfully submit that it does not present any question for review by this Court.

The third assignment of error charges that the Supreme Court of South Carolina erred in holding and deciding that there was evidence that plaintiff's intestate was employed in interstate commerce at the time he received the injuries resulting in his death. The evidence of this fact, which appears in the record and which was brought to the attention of the Supreme Court of South Carolina, will be found at folios 25, 26, 35, 109 and 113, and is as follows:

Plaintiff's witness, Barker, under cross-examination by defendant's counsel, Mr. Lyles, testified:

"Q. Mr. Barker, you were what they called yardmaster?
A. Yes, sir.
Q. That is, you had charge of the switch engine and its crew?
A. Yes, sir.
Q. Who was engineer of that train 419 on this night?
A. Beecher.
Q. Who was fireman?
A. I do not remember who the fireman was.
Q. What switchman did you have?
A. J. T. Koennecke and Charlie Brown.
Q. Brown, he is colored?
A. Yes, sir.
Q. Now, Mr. Barker, before engine 423 came in with these cars you had taken cabs off track 3?
A. Yes, sir.
Q. That was train No. 67?
A. Yes, sir, from the North.
Q. And it came from Hamlet, N. C.?
A. Yes, sir, as I understand.
Q. You took a cab off that train and took it over to track 8?
A. Yes, sir.
Q. And while you were over there—then when you left track, you had left the rest of train 67 on track 3?
A. Yes, sir.
Q. Train 67 had, before you started on those cars at all, and had pulled those cars on track 3, and that engine had cut off and left cars there for you to break up?
A. Yes, sir.
Q. You had taken cabs to track 8, while you were over there with these cabs—what were you going to do with the cabs?
A. Had some local cars on 9. To catch those cars and put them on cabs to go north the next morning.
Q. That was the train that went back to Hamlet?
A. Yes, sir.
Q. In the meantime, while you were with that cab, extra 77 came in from the South?
A. Yes, sir.
Q. And came on track 3?
A. Yes, sir.
Q. You had left the rest of train 67 on track 3?
A. Yes, sir.

Q. That caused engine 77 to stop?
A. Yes, sir.
Q. It was up to you to take those cars off 3 so engine 77 could come through and go to the roundhouse?
A. Yes, sir.
Q. No. 67 came in from Columbia, didn't stop at Columbia?
A. No, sir.
Q. Brought the cars there solid?
A. Yes, sir.
Q. You took the cars out of that train and set them on the tracks, and those coming to Columbia you brought back to Columbia?
A. Yes, sir.
Q. Those going to Savannah and Jacksonville you put in train going there, and those going to Hamlet, you put in trains to go there; that is what 419 went backing that train for?
A. Yes, sir."

NOTE.—Plaintiff's intestate was on the crew of engine 419 switching in Cayce yards. Engine 423 ran over him. This engine backed into the Cayce yard from Columbia.

Defendant's witness, Rogers, testified:

"Q. Be careful and speak so these gentlemen can hear you. Are you an engineer in the employ of the Seaboard?
A. Yes, sir.
Q. Were you so employed June 13, '13?
A. Yes, sir.
Q. Did you go into the Cayce yard on the night Mr. Koennecke came to his death there?
A. Yes, sir.
Q. On what train did you come in?
A. Extra 77.
Q. From which direction?
A. From the South.
Q. At that time you were running up to Cayce to go back to Savannah?
A. Yes, sir.
Q. You got to Savannah, what did you do with the cars?
A. Put them in the yard track, cut off the engine.
Q. Did you run through or local freight?
A. Through freight.
Q. Do you put off any car boxes from the time you leave until you get to Savannah or until you come to Columbia?
A. Sometimes.

Q. Generally you would not? What do you mean by through freight?

A. I suppose all through cars, but we have junctional points.

Q. From where?

A. From this end to the other end, or Cayce to Savannah, but we have junctional points along the road, supposed to switch off cars.

Q. Where does the Seaboard run from?

A. Has headquarters at the other end. From Richmond to Tampa, Fla.; have extensions.

Q. Go through North Carolina to Hamlet?

A. Virginia, North Carolina, South Carolina, Georgia and Florida; through all these States.

Q. Are they engaged in carrying freight between those States?

A. Yes, sir, I think they did.

Q. Cayce is one of the yards where they make up trains and distribute cars?

A. Make up and break up cars.

Q. These interstate freight trains are taken charge of and made into different trains and go in various directions?

A. Yes, sir."

Extra train 77 was an interstate train which had come from Savannah, Georgia. Plaintiff's intestate was breaking up an interstate freight train, No. 67, which had arrived from Hamlet, N. C. The purpose of breaking up this train was twofold, as shown by the evidence. First, to distribute the cars which had arrived on the freight trains from Hamlet, N. C., and, second, to clear the track so that the engine which had brought No. 77, another interstate train, into the yards from Savannah, Ga., could get to the roundhouse.

In view of this testimony, we do not see how it could be successfully contended that intestate was not engaged in interstate commerce.

Seale v. *Ry.*, 229 U. S., 156;
Pederson v. *Ry.*, 229 U. S., 146;
N. Y. Central Ry. v. *Carr*, 35 Sup. Ct. Rep., 780.

Assignments 4, 5, 6, 7, 8, 9, 10, and 11 all in various forms impute error to the Supreme Court of South Carolina in affirming the rulings of the trial Court upon the questions of procedure, admissibility of evidence, sufficiency of the evidence and various rulings of the trial Court, which do not involve any construction of the Federal statute.

We respectfully submit that these assignments of error do not raise any questions for this Court to pass upon. This case does not come from a Federal Court and this Court, therefore, is not a Court of general review. The case comes under Section 709, Revised Statutes of the United States. The mere fact that it was tried under the Federal Employers' Liability Act does not give this Court jurisdiction to review. There has been no decision against any title, right, privilege or immunity specifically set up or claimed by the plaintiff in error, defendant below, nor has the Employers' Liability Act of Congress been erroneously construed, nor has the plaintiff in error been denied a construction of the Act to which he was entitled.

The assignments of error do not raise any one of the questions mentioned; and, therefore, we respectfully submit that this Court is without jurisdiction.

DuVal v. *S. A. L. Ry.*, 225 U. S., 477.

This Court has had occasion quite recently to say that "questions in a suit under the Federal Employers' Liability Act, which relate to matters of pleading, to the admissibility of evidence and sufficiency of exceptions and to the various rulings of the trial Court involving no construction of the Federal Statute, cannot be considered on a writ of error from the Federal Supreme Court to a State Court."

Central Vt. Ry. v. *White*, 35 Sup. Ct. Rep., 866.

In so far as the assignments of error question certain findings of fact by the Supreme Court of South Carolina, we submit that these questions are not open for review by this Court.

St. L. I. M. & S. Ry. v. *Craft*, 35 Sup. Ct. Rep., 707, and cases cited.

We also call attention of this Court to the fact that the opinion of the Supreme Court of South Carolina establishing these findings of fact, was a unanimous opinion.

The case was tried under the Employers' Liability Act of Congress, all the issues were fairly submitted to the jury upon full and proper instructions by the trial Court, the Supreme Court of South Carolina has approved the charge and there are no assignments of error to the charge as given, nor is there any prejudicial error assigned in any respect. The judgment should be affirmed.

Respectfully submitted,

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W. H. COBB,
Attorneys for Defendant in Error.

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In the Supreme Court of the United States.

OCTOBER TERM, 1915.

No. 491.

SEABOARD AIR LINE RAILWAY, PLAINTIFF IN ERROR,

vs.

MRS. BEAUREGARD MAGDALENE KOENNECKE, AS ADMINISTRATRIX OF THE ESTATE OF J. T. KOENNECKE, DECEASED, DEFENDANT IN ERROR.

ON WRIT OF ERROR TO THE SUPREME COURT OF SOUTH CAROLINA.

BRIEF OF DEFENDANT IN ERROR ON THE MERITS.

STATEMENT FOR DEFENDANT IN ERROR.

This Court disposed of a motion to dismiss or affirm the writ of error in the above entitled case by placing same upon the summary docket for hearing.

Defendant in error filed a brief on the motion in which a statement of the facts was set forth and respectfully craves reference to the statement contained in that brief, which is supported throughout by the evidence in the case, and in view of the fact that the plaintiff in error, in his brief, has made a full statement of the case which is based on his own contentions, rather than the facts as brought out in the record, we beg to call the attention of the Court to the following errors in that statement:

I. At page two of said brief it is claimed that the complaint originally served in this case alleged a cause of action under the Sections 3955 and 3957 of the Code of Laws of South Carolina, commonly known as the "Lord Campbell's Act," which Act is then set out in full.

It is true that the complaint stated facts which constituted a cause of action under the State law, but it will be noted that in no part of the complaint was reference made to the State law and no part of it alleged that the services being performed by the deceased at the time of his death were intrastate.

It was seriously contended and admitted by the trial Judge that the complaint stated a cause of action which would be applicable either to the Federal Employers' Liability Act or to the State Act (pages 28 and 30 of the Record). The learned Justice, in writing the opinion of the State Supreme Court, said that the complaint stated a cause of action under Lord Campbell's Act of South Carolina, which we have always admitted, but he did not find that the original complaint did not also state facts sufficient, in its original form, to support an action under the Federal Employers' Liability Act. While the complaint did not state that the deceased was employed in interstate commerce, it did state that the plaintiff in error owned and operated the line of railroad where the accident occurred which was incorporated under the laws of the States of Virginia, North Carolina and South Carolina, and that the said line ran through the State of South Carolina, as a common carrier of passengers and freight (Record, pages 1 and 2).

The original complaint also contained an allegation that all the beneficiaries of the suit, who were named, were dependent upon the deceased for support, which was not necessary under the State law, but which would be appropriate to an action under both the Federal and State Acts. So, that it was not at all admitted that the original complaint was brought exclusively under the State Act.

These facts will become pertinent in arguing the question hereinafter as to whether or not the amendment made by the trial Judge was of such a nature as to deprive the plaintiff in error of the Federal right, under the Fourteenth Amendment to the Constitution of the United States.

II. The statement of facts, at page two of brief of plaintiff in error, attempts to state the acts of negligence set out in the complaint of the defendant in error.

He omits the first allegation of negligence "in failing to furnish a safe place for the plaintiff's intestate to work." This he covers in the following words: "In having the yards improperly lighted and

the walkways therein in improper condition." The allegations being set out in the following words: "In failing to furnish adequate lights for his protection; in having the track and walkways between the tracks in a defective and unsafe condition."

It will be noted, also, that plaintiff in error states under the heading "B and C," two acts of negligence which he claims were alleged in the complaint which were not alleged as the acts of negligence relied on by the defendant in error, but simply appear in the narrative of the injury stated under another paragraph of the complaint (see Record, page 2).

III. It is stated on page 4 of the brief of plaintiff in error that the answer of defendant was duly filed and served to the complaint under the Lord Campbell's Act of South Carolina.

Attention is called to the terms of the answer, at pages 3 and 4 of the Record, which show that it makes no reference whatever to the Lord Campbell's Act, and that it is appropriate to an action under either the State or the Federal law.

IV. It is stated on page 6 of statement of the evidence that the deceased "had started his employment with defendant as night yardmaster, in which capacity he was headman in actual charge of a switching crew, but when killed he was an ordinary switchman."

This is a correct statement of the fact, but it might be added, in justice to the deceased, that the uncontradicted evidence showed that his reduction to switchman was due to the fact that the business of the yard had fallen off considerably and it had become necessary for the plaintiff in error to reduce its force to such an extreme that they could not maintain the same number of crews that they had before, and such reduction was not due to any incapacity or improper conduct on his part.

V. At pages 7, 8 and 9 quite a lengthy statement is made as to the different trains that were on the yard at the time, in an endeavor to show that the deceased had finished what duties he had with his train and had nothing to do but look out for the incoming number 423.

This statement is made almost entirely from parts of the testimony which the plaintiff in error relied upon, but it is largely in conflict with the testimony of other witnesses which cannot be reconciled with it.

Such portions of that statement as placed the deceased at track number 3 just before the injury are based entirely on the testimony of a negro switchman, Charlie Brown, whose statements were not substantiated by any of the circumstances or testimony of any of the other employees of the plaintiff in error who were present and

testified, and it is reasonable to suppose that his statements were rejected by the jury as unworthy of belief.

Charlie Brown states that he was on engine, Koennecke at lower end of cars looking at cars they were coupled to and not at the incoming train (page 72 of Record).

The plaintiff in error having filed a brief setting forth the specifications of error relied on, the defendant in error desires to file this additional brief discussing certain features of the case which were not covered by its brief filed on the motion to dismiss.

SPECIFICATION I.

Specification I charges error in refusing defendant's request, as follows:

> "It is not the duty of the crew of a switching engine moving through switching yards to ring the bell or give other signals for the benefit of an employee whose duties require him to work in the yards, and who knows, or by the exercise of ordinary care could know, that switching engines were constantly moving through the yeards, and who should reasonably anticipate and expect the engine in question, it being the duty of such employee to be on the lookout for the switching engine and not the duty of the crew of the switching engine to be on the lookout for the employee."

It is asserted that this request contains a construction of the Federal Act, and is, therefore, reviewable by this Court. We do not so concede. We see nothing in this specification which raises any Federal question, and the same should not be considered. The question at best is one of general law, and this Court has held that such questions would not be considered on a writ of error from a State Court.

Central Ry. Co. v. *White*, 238 U. S., 507.
Seaboard Air Line Ry. v. *Duval*, 225 U. S., 477.
Yazoo & M. V. Ry. Co. v. *Wright*, 235 U. S., 376.

However, considering this specification, we find it to be without merit. The Supreme Court of South Carolina, in disposing of this question, says:

> "We cannot assent to the view that, under no circumstances, is it the duty of the crew of a switching engine moving in a switching yard to give signals of its approach for the benefit of other employees working in the yard, even though they may know that it is moving about the yard, and be under the duty of

looking out for it. But if the law were as contended, the engine in question had not theretofore been moving about the yard. Its regular place of work was in another yard. It had just arrived in the yard where it ran over deceased, and its arrival may not have been expected.

While the undisputed evidence shows that Rule U, which forbids the moving of engines or cars backward without lookout, was not applicable to yard service, it was conceded that it was applicable on the main line. Therefore, under the rule, the engine should have had a lookout while on the main line from Columbia to Cayce. As it was a question of fact whether this more extended movement than yard service had been completed, there was no prejudicial error in admitting the rule, for it was for the jury to say whether, under the circumstances, the lookout should have been kept on the backing engine after it entered the yard and until its extended movement was completed."

The plaintiff in error, in the Courts below, relied upon the case of *Aerfetz* v. *Humphries et al.*, 145 U. S., 418, and we find this case cited here to sustain this specification. The case mentioned was one in which a track workman, or section hand, was held, under the facts of that particular case, to have been guilty of contributory negligence as a matter of law in failing to observe and get out of the way of a switch engine switching in the yard where he was working. There was absolutely no dispute about the facts in that case. The Circuit Judge, who tried the case on Circuit, directed a verdict upon this ground, and this Court upheld its ruling. We do not see that this case is any authority for the proposition now contended for by plaintiff in error. Counsel for plaintiff in error, using the Aerfetz case as his guide, framed his request to charge which we have quoted. The Court will observe that this request is very broad, and if upheld commits the Court to the unqualified proposition that no matter what the circumstances of any particular case might be, it is never the duty of a switch engine, moving in switching yards, to give signals of its approach for the benefit of other employees working in the yard. We do not think that the Federal Court has ever laid down any such iron bound rule, but even if it had, the case now before the Court is not such a case. In the first place, we submit that the train of cars, or engine, which ran over and killed the deceased, was not engaged in switching. The train was backing from Columbia, S. C., to Cayce, S. C., a distance of three and one-half miles, over the main line track across the Congaree River and over a long trestle (see page 68 of Record).

In the case of *U. S.* v. *Erie R. R.*, 237 U. S., 402, this Court says:

> "1. The yards of an interstate railway carrier at Jersey City, Weehawken, and Bergen, cannot be regarded as a single yard, so that the movements of trains between them may be regarded as switching operations not governed by the airbrake provisions of the Safety Appliance Act of March 2, 1893 (27 Stat. at L., 531, Chap. 196, Comp. Stat. 1913, Sec. 8605), and its amendments, where they lie from 2 to 3½ miles apart, and are not so linked together that cars may be moved from one to another with the freedom which is usual and essential in intrayard movements, and where in actual practice they are treated as separate yards.
>
> 2. Transfer trains of freight cars which move over main tracks and over switches leading to other tracks, and through a dark tunnel, and across passenger tracks in their operation by an interstate railway company between its yards in Jersey City and Weehawken and its yard in Bergen, which lie from 2 to 3½ miles apart, and are not so linked together that cars may be moved from one to another with the freedom which is usual an essential in intrayard movements, and which are in actual practice treated as separate yards, are 'trains' within the meaning of the provisions of the Safety Appliance Act of March 2, 1893 (27 Stat. at L., 531, Chap. 196, Comp. Stat. 1913, Sec. 8605), and its amendments, forbidding the operation of trains in which less than the requisite number of cars are controlled by airbrakes."

To the same effect is *U. S.* v. *C., B. & Q. Ry.*, 237 U. S., 410.

There must be some duty resting upon the crew of an incoming train, especially when it is backing into a yard, to protect the train and safely pilot the same into the yard and there deliver it to those in charge. Rule U of plaintiff in error, which was offered in evidence, and which was contained in general instructions to employees, provides as follows: "Cars will not be moved in front of an engine or engine moved backwards unless there is an employee on the front of the moving car and on the rear of the engine to keep a lookout in the direction the movement is being made to avoid striking persons or obstructions on the track. Enginemen, as well as conductors, will be held responsible for a violation of this rule" (see page 50 of the Record).

The plaintiff in error, defendant below, offered evidence to the effect that this rule did not apply to yard movement. It is conceded that the rule was applicable to main line or train movement (see

page 130 of the Record). We repeat that the movement being made was not a switch or yard movement, but was a train movement over the main line tracks, and, therefore, Rule U applied with full force, and the Court would have been warranted, we submit, in charging the jury that Rule U did apply. However, the Court did not so charge, but left it to the jury to say whether or not under the circumstances of the case, an employee should have been kept on the backing engine until it had completed the movement. We submit that this charge of the Court, in leaving this question to the jury, was more favorable to the plaintiff in error than it deserved. The train which ran over and killed deceased had just arrived at Cayce and had not completed its trip. It was not a switch engine of the Cayce yard (see pages 57 and 73 of the Record). The movement being made was an extended movement and not a yard movement (see pages 57, 65 and 68 of the Record). The engine had not been at Cayce before on the night in question (see page 67 of Record). Columbia yard and Cayce yard separate and distinct (see page 12). There is no testimony that it was expected nor is there any testimony deceased knew of its presence. The only switch engine working in the Cayce yard was the engine upon which the deceased was employed as a member of the crew.

We call the Court's attention to the statement of the plaintiff in error in what he says is the common law rule as applied to employees in a switching yard and enforced by the Federal Court, and it will be noticed that the rule is qualified to the extent that it only applies to a switch engine engaged in an *ordinary and customary movement and so long as there is nothing unusual about the movement.* As we have already shown, the engine that killed deceased was not engaged in an ordinary or customary switch or intrayard movement, but was engaged in a train movement over main line tracks, which movement had not been completed and the movement was not and could not be made with the freedom which is usual in an intrayard movement.

U. S. v. *Erie R. R. Co.,* 237 U. S., 402.

The Supreme Court of South Carolina made this matter perfectly clear, and found as a fact that this was an extended movement.

SPECIFICATION II.

The argument already advanced under Specification I seems to us to cover this specification and make further discussion of it unnecessary.

SPECIFICATION III.

Subdivision A. This specification states that there was no evidence that plaintiff's intestate was employed in interstate commerce. The evidence showing this is referred to in the brief of the defendant in error filed upon the motion to dismiss, and to that discussion we ask the Court's attention (see, also, pages 69, 83, 95 and 96 of the Record).

We submit that a casual reading of the Record will show that there was ample testimony to warrant the Court in charging the jury as a matter of law that the deceased was employed in interstate commerce. However, the Court did not so charge, but left the question to the jury to determine under the facts of the case (see page 110 of the Record). The jury has settled this issue and the Supreme Court of South Carolina has found that the evidence on this point was sufficient (see page 127 of the Record).

As shown in brief filed on motion to dismiss, intestate was engaged in switching cars which had arrived on an interstate freight train. The purpose of switching was to distribute the cars into various trains going in all directions; some going to Savannah, Georgia, some to Jacksonville, Florida, and others to Hamlet, North Carolina (see Record, page 26); also to clear track so that an interstate engine which had arrived from Savannah, Georgia, could go to the roundhouse (see page 23 of Record).

In the case of *New York Central Railroad* v. *Carr*, 238 U. S., 260, a switchman injured while switching two cars loaded with intrastate freight out of an interstate train was held to be engaged in interstate commerce; the Court saying:

> "A brakeman in a pickup freight train, running between points in the same State, but containing some cars loaded with interstate freight, who was injured, while attempting, in the course of his employment, to set the brake on an intrastate car which had been cut out of the train and backed into a siding, was employed in interstate commerce, within the meaning of the Federal Employers' Liability Act, when the setting of such brake was necessary in order that the engine to which the car was attached might, when uncoupled, return to the train and pursue on its journey."

Subdivision B. This subdivision charges that there was no evidence of negligence proximately contributing to plaintiff's intestate's death. There was ample testimony offered in support of every allegation of negligence charged in the complaint and the case was submitted to the jury under a full charge of the Court. The charge

was such as has been approved by this Court in *Moore* v. *S. A. L. Ry.*, 228 U. S., 433; *McGovern* v. *Ry.*, 235 U. S., 389.

Even if we were to concede, which we by no means do, that the testimony offered in support of the allegations of negligence in the complaint was meager, this Court should not dismiss the case.

> "The evidence upon the merits of the case, though obscure and meager as to the circumstances of the accident, were such as to justify its submission to the jury."
>
> *Am. R. R. Co. of Porto Rico* v. *Didrichen*, 227 U. S., p. 145.
>
> "A verdict in favor of plaintiff in an action for death should not be set aside by an appellate Court for lack of evidence to support it unless the testimony was such that no recovery could be had upon the facts shown in any view which can properly be taken of them."
>
> *Myers* v. *Pittsburg Coal Co.*, 233 U. S., page 184.

Subdivision C. This specification charges that the evidence admitted only of inference that intestate assumed the risk. As already stated, there was testimony offered as to the various allegations of negligence in the complaint, and we submit that any direction of a verdict in this case would have been improper. This specification was argued on Circuit practically upon the same ground as Specification I, and having fully discussed that question, there is little more that can be said. We would direct the Court's attention to the fact that the Aerfetz case is now being relied upon by the plaintiff in error to support a direction of verdict upon the ground that the deceased assumed the risk; whereas, that case was one involving the law of contributory negligence. It seems to us that if there were any merit at all in this contention, it would be as a question of contributory negligence; but, as is well known, contributory negligence under the Employers' Liability Act will not support a direction of verdict, but is made a jury issue; so, therefore, the plaintiff in error knowing this, is endeavoring to use this case in support of a motion to direct a verdict on the ground that the deceased assumed the risk. We call this Court's attention to the fact that at the trial of this case defendant was accorded the benefit of the defense of contributory negligence as provided by the Employers' Liability Act, and also was accorded the common law defense of assumption of risk. The jury was correctly and fully charged by the Court, and there are no specifications of error to the charge given. It was in accord with the decisions of this Court.

T. & Pacific Ry. Co. v. *Gentry*, 163 U. S., p. 350.

Moore v. *S. A. L. Ry.*, 228 U. S., 433.

A direction of a verdict was not warranted and would have been improper.

McGovern v. *Ry. Co.*, 235 U. S., 389.

SPECIFICATION IV.

Specification four charges error in proceeding with trial of the case after the complaint was amended. The plaintiff in error concedes in his brief that the Court had the power to allow the amendment, and it seems to us that the Supreme Court of South Carolina has completely and finally disposed of this matter, and, as we have already discussed this question in our brief filed upon motion to dismiss, we will not discuss it further, but simply add that as additional authority for the allowance of the amendment this Court has recently held in case of *Central Ry.* v. *White*, 238 U. S., 507, that such amendment as was made in this case is allowable and the record will show that the plaintiff in error came to the trial prepared to prove that the plaintiff's intestate was employed in interstate commerce. He was the first to inject this issue into the case.

As stated by the Supreme Court of South Carolina, his purpose was to obtain a nonsuit and the defendant in error had the legal right, which right she exercised in order to escape the disaster and delay of a nonsuit, to amend the complaint and try the case according to the law as suggested by the plaintiff in error.

The allegation of paragraph seven of the complaint, which was not amended, was as follows:

> "That the said J. T. Koennecke left as his only heirs and distributees at law his wife, the plaintiff herein, and his four children as above named, who were dependent upon him for support, comfort and maintenance in life, and by reason of his death, caused by the negligent, wanton, wilful and reckless acts of the defendant as aforesaid, they have suffered damages in the sum of seventy-five thousand ($75,000) dollars."

The contention advanced by the plaintiff in error to the effect that the question of dependency was not an issue, under the State law, is erroneous. It is true that recovery under the State law can be had in the absence of evidence showing pecuniary loss, but where there is no evidence of pecuniary loss, it is the duty of the Court to instruct the jury not to consider pecuniary loss as an element of damage.

Barksdale v. *Seaboard Air Line*, 76 S. C., 183.

In addition to that the trial Court in finally ordering the case on for trial after the amendment, addressed the following language to the attorney for plaintiff in error:

"You had the opportunity to continue the case and you would not avail yourself of it. It is not my fault; I left it in your hands and you would not avail yourself of it. I was going to continue the case, if you said, under the circumstances, you could not go to trial" (Record, page 33).

The plaintiff in error should not be heard to complain because the defendant in error exercised her legal right to try the case according to his view rather than to stand by and suffer her case to be nonsuited.

Respectfully submitted,

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Service of this brief acknowledged this 22 day of November, A. D. 1915.

J. Berry B. Lyles
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